REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

AND

OTHER COURTS.

With Tables of the Cases and Principal Matters.

BY

WILLIAM JOHN BRODERIP, of LINCOLN'S INN,

AND

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BARRISTERS AT LAW.

VOL. II.

Containing the CASES from EASTER TERM, 1 GEO. IV.
TO TRINITY TERM, 2 GEO. IV.
BOTH INCLUSIVE.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR JOSEPH BUTTERWORTH AND SON, LAW BOOKSELLERS,

43. FLEET-STREET;

AND J. COOKE, ORMOND-QUAY, DUBLIN.

1821.

JUDGES

OF THE

COURT OF COMMON PLEAS,

During the Period comprised in this VOLUME.

The Right Hon. Sir ROBERT DALLAS, Knt. Ld. Ch. J.

Hon. Sir JAMES ALLAN PARK, Knt.

Hon. Sir JAMES BURROUGH, Knt.

Hon. Sir JOHN RICHARDSON, Knt.

A

TABLE

OF THE

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

N. B. The Cases, the Names of which are printed in *Italics*, are printed or cited from MS. Notes.

Childs

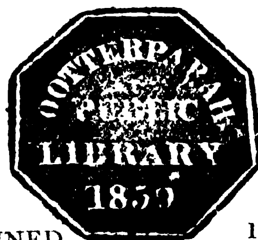
ADDENDA ET CORRIGENDA

VOL. I.

Page 106. line 13. for "damages," read "arrearages"
537. —— 33. for "Plaintiff," read "Defendant."

VOL. II.

Page 187. line 16. for "executed," read "excused."
188. —— 10. for "acceptor," read "holder."
221. —— 13. for "B." read "A."
240. —— 25. for "acceptor," read "holder."
241. —— 18 and 20. for "drawer," read "drawee.
—— 31. for "holder," read "drawer."
279. —— 11. for "holder," read "drawer."
404. —— 15. for "take," read "lake."
622. at the bottom, insert "Rule refused."
660. —— for "Yates v. Cole," read "Gates v. Cole.



CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the First Year of King GEORGE IV.

PROMOTIONS.

In this term, *Henry Brougham*, of *Lincoln's Inn*, Esq. Barrister at Law, having been appointed Attorney-General to the Queen, and

Thomas Denman, of *Lincoln's Inn*, Esq., Barrister at Law, having been appointed Solicitor-General to her Majesty, took their seats within the bar accordingly.

WALKER *v.* MILLS. (*a*)

April 20.

An unqualified person, by the orders and in the presence of his master, a qualified person, set on his master's grounds a trap for hares, &c. and afterwards, finding a hare therein, carried it, according to order, to his master, who was not present when the hare was found: Held, that the Defendant was not liable to the penalties for using snares to destroy game, or for exposing game to sale.

DEBT to recover penalties, on 5th *Anne*, *c.* 14. *s.* 4., and 9th *Anne*, *c.* 25. *s.* 2., for using a snare to destroy game (the Defendant not being qualified), and for expos-

(*a*) *Park* J. was absent the whole of this term, from indisposition.

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exposing a hare to sale. Plea, general issue. The following facts were proved before *Garrow* B., at the last *Sussex* assizes.

The Defendant, a cottager in the employ of a qualified person, was on *Sunday* morning, found with a hare in his possession, which he had just taken out of a trap placed on his master's property. The master stated, that the trap was placed there on the *Thursday* preceding by his direction, and in his presence, for the purpose of catching hares and rabbits which had annoyed him; that the Defendant had received orders from him to bring to his (the master's) residence, whatever might be caught in the trap, and that the Defendant had, accordingly, brought the hare in question to him on the *Sunday* morning on which it was seen in the Defendant's possession.

The learned Judge thought the point new, but having directed the jury that this resembled the case of a qualified person attended by persons unqualified, assisting him in the operations of sporting; that the Defendant was acting as servant to his master, and under his directions; and that, therefore, the possession of the hare by the servant must be taken to be the possession of the master; the jury found a verdict for the Defendant.

D'Oyly Serjt. now moved to set aside this verdict and have a new trial on the ground of a misdirection, contending, that the result of the various cases on this subject was, that the right of a person qualified to kill game did not extend to the protection of persons unqualified, unless the qualified person were actually present; and that a qualified person had no right to send out one unqualified to kill game for him: that the master, in this case, though present at the setting of the trap, was absent when the hare was caught and found in the Defendant's possession, and that such possession constituted

tuted an exposure to sale, under the 9th *Anne*, *c.* 25. *s.* 2. He cited *Molton* v. *Cheesely*. (*a*)

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DALLAS C. J. Cases of this sort frequently run into very nice distinctions, and I would not hastily lay down a general rule which might afterwards be open to objection. If I had any doubt I would look into the cases that have been referred to; but I have none: nor have I any hesitation in saying, that this action is most improperly brought. For what are the circumstances of this case? The Defendant was the servant of a qualified man, who, finding his land annoyed by hares and rabbits, ordered this trap to be set, with a view to their destruction. I take it to be perfectly clear, that a qualified person has a right to order a trap to be set for such a purpose, even in his absence; but, in this case, the qualified person was present, and superintended the setting of the trap. In this trap the hare was afterwards caught, and the catching was a catching by the master on his own land. Then as to the possession, the master ordered, that whatever was caught should be brought to him: the hare was brought the moment it was taken, and the possession of the servant in the act of taking the hare to his master, was under the master's direction, and the same as the possession of the master.

BURROUGH J. Actions of this kind do a great deal of mischief; there was no pretence for charging this Defendant with an illegal taking or possession.

RICHARDSON J. The trap being set by the master's order and in his presence, the hare was in effect caught by him. As to the possession, it is proved that he ordered his servant to bring to him whatever might be

(*a*) 1 *Esp.* 123.

taken;

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taken; so that the case falls within the principle of *Warneford* v. *Kendall* (a). The learned Judge also referred to *Spurrier* v. *Vale*. (b)

D'Oyly took nothing by his motion.

(a) 10 *East*, 19. (b) 10 *East*, 413.

April 26.

CROMACK v. HEATHCOTE, Esq.

An attorney, being requested to draw an assignment of goods, refused, and the deed was drawn by another. The validity of the deed being afterwards questioned, on the ground of fraud, in an action against the sheriff in which the attorney first applied to was not employed: Held, that the communication made to this attorney was professional, and that evidence of the fraud proposed to be given through him, was properly rejected.

TRESPASS against the sheriff for seizing goods under an execution. The defence set up was, that the goods had been conveyed by the father (against whom the execution issued) under a fraudulent assignment to the son. To prove the fraud, the Defendant proposed, among other evidence, to call *Smith*, an attorney, to whom the father had applied to draw the assignment, and who had refused to draw it, knowing that an execution had been issued against the father. This attorney was not employed in the cause, and did not draw the assignment. *Richards* C. B., before whom the cause was tried at the last *Hertfordshire* assizes, rejected this evidence, on the ground that it was a confidential communication made to an attorney. The jury found a verdict for the Plaintiff.

Taddy Serjt. now moved to set aside this verdict and have a new trial, on the ground (among other objections) that this evidence had been improperly rejected. He contended, that the rule, as to the exclusion of the evidence of solicitors touching matters on which they had been consulted, extends only to communications made in the pro-

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progress of a cause; and urged that a solicitor had been examined touching a dissolution of partnership (*a*), and to prove the usurious consideration of a deed he had drawn, *Duffin* v. *Smith* (*b*); and that Lord *Kenyon* seemed to confine the rule to communications made in the conduct of a cause, *Cobden* v. *Kendrick* (*c*). He cited also *Wilson* v. *Rastall* (*d*), and *Du Barré* v. *Livette*. (*e*)

DALLAS C. J. The Plaintiff came to employ *Smith* as an attorney, though *Smith* happened to refuse the employment. The enquiry made by Lord *Kenyon* in *Wilson* v. *Rastall* is, whether the party was, as he

(*a*) The reporters are indebted to the kindness of a gentleman at the bar, who was present at the time of the decision, for the following note:

WADSWORTH *v.* HAMSHAW and ASPINAL.

Coram ABBOTT C. J. *March* 1. 1819.

IN an action against the Defendants for goods sold and delivered, the question was, whether the Defendants were partners at the time the goods were delivered. On the part of the plaintiff, *Hughes*, an attorney, stated that the Defendants had called upon him to advise them professionally, respecting the dissolution of their partnership. *Gurney* and *Merewether* objected to the admissibility of this evidence, upon the ground that what passed between *Hughes* and the Defendants was a professional communication.

ABBOTT C. J., without calling upon *Scarlett*, who was on the other side, ruled, that the evidence was admissible; that the communication was not privileged; and that protection was only extended to those communications with an attorney which related to a cause existing at the time of the communication, or then about to be commenced. His Lordship then cited a case of an action for bribery, tried on the *Midland* circuit, (and attended by Serjts. *Adair* and *Wilson*,) in which the attorney for the Defendant was called to prove some communication with his client. The evidence being objected to by the Defendant's counsel, was rejected; but upon an application to the Court, a new trial was granted; and the Court then decided, that no professional communication was protected except such as related to a cause.

(*b*) *Peake N. P. C.* 146.

(*c*) 4 *T. R.* 431.

(*d*) 4 *T. R.* 753.

(*e*) *Peake N. P. C.* 108.

stated,

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stated, consulted professionally; and is not this a consulting on professional business? One is staggered at first on being told that there are decided cases which seem at variance with first principles the most clearly established; but the cases cited do not at all bear out the proposition contended for, and I know of no such distinction as that arising from the attorney being employed or not employed in the cause. To confine ourselves to the present case: here is a client who goes to give instructions touching a deed, and the communication must be deemed confidential, as between attorney and client, though the attorney happens to refuse the employment. I have no manner of doubt on the subject; and it might be of most mischievous consequence if, by granting a rule, we should be supposed to have cast any doubt on it.

BURROUGH J. It would be most mischievous if it were once doubted whether or no a communication such as this were confidential as between attorney and client.

RICHARDSON J. Suppose the case of an attorney consulted on the title to an estate, where there was a defect in the title, can it be contended that he would ever be at liberty to divulge the flaw? I never heard of the rule being confined to attornies employed in a cause. I am of opinion, that the communication in this case was of a nature not to be divulged by the attorney to whom it was made.

Rule refused.

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ROBERT HINDE, Demandant, JOHN HINDE, Tenant, RICHARD BLAND, Vouchee.

April 26.

The Court allowed a recovery to pass, where the certificate of the notary (that the party who made the affidavit of the caption and acknowledgment of the warrant of attorney was sworn in his presence before the deputy fiscal at *Cape Town*,) omitted the day and month in the body of the certificate, but stated it correctly at the end, where the notary witnessed the instrument; the date of the jurat of the affidavit being the same as that at the bottom of the certificate.

ONSLOW Serjt. moved to pass a recovery under the following circumstances.

The warrant of attorney was taken and acknowledged at *Cape Town*, *Cape of Good Hope*, before two commissioners. The usual affidavit of caption and acknowledgment was sworn before the deputy fiscal at *Cape Town*, by *G. C.*, one of the commissioners, on the 31st of *July*, 1819; endorsed on the affidavit was a certificate of a notary public dwelling in *Cape Town*, that the commissioner who had made the affidavit of the caption and acknowledgment, was sworn in his (the notary's) presence to the truth of the same affidavit, before *P. B. B.*, on the day of , 1819; and he further certified, that the said *P. B. B.* was deputy fiscal, and as such, usually administered oaths, and had power to administer such oath, and that the name subscribed to the said affidavit, and also the name of *P. B. B.* subscribed to the jurat, were of their respective hands-writing. To the end of this certificate, the notary public making it had put the date of the 31st of *July* 1819, his name and description, and also, as was supposed, (for the wax was gone,) his notarial seal. The only question was, whether the recovery should pass, there being a blank in the body of the certificate for the day and month when *G. C.* was sworn to the truth of the affidavit of caption and acknowledgment. The learned Serjeant prayed that the recovery might be allowed to pass, notwithstanding this blank; and urged, that the date of the certificate (31st *July*,) being the same as that of the jurat of the affidavit of caption, there was sufficient evidence that the certifi-

1820. cate was a certificate of the oath being taken on the same 31st of *July*, and that it could not be of a subsequent day.

Rule granted for the recovery to pass.

April 27. DINSDALE, Assignee of the Sheriff of MIDDLESEX, *v.* EAMES.

The Defendant in an action on a bail bond (given in an action of debt against himself) becoming bankrupt between plea and verdict in the action on the bail bond, and obtaining his certificate after judgment, is discharged from the damages and costs.

ON the 3d of *June*, 1819, the Defendant was sued on a bail-bond given by him in an action for debt against himself. On the 17th of *June* he pleaded to the action on the bail-bond; on the 4th of *November* he became a bankrupt, and a commission issued against him in the course of that month. The action on the bail-bond came on to be tried at the sittings in *Hilary* term, 1820, when a verdict was found for the Plaintiff. Judgment was entered up, and the Defendant taken in execution for damages and costs on the 29th of *March*, 1820; on that day the Defendant's certificate under the commissioner of bankrupt was allowed by the Chancellor, having been signed by the creditors on the 6th of *February*, in the year last mentioned. When the Defendant was taken in execution he paid the Plaintiff's attorney 51*l.* towards the damages and costs.

Pell Serjt., having obtained a rule *nisi* to have this sum, paid under the writ of *ca. sa*, restored to the Defendant or his attorney,

Taddy Serjt. now shewed cause against the rule. The question is, whether a Defendant in an action on a bail-bond, becoming bankrupt between plea and verdict, and

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and obtaining his certificate after final judgment, is discharged from the damages and costs. He is not discharged, because the debt is not one that can be proved under the commission; till judgment is given, it cannot be ascertained what is due for costs, either in the original action, or the action on the bail-bond. The various cases (*Ex parte Hill* (a), *Ex parte Charles* (b), *Walker* v. *Barnes* (c), and *Buss* v. *Gilbert* (d),) establish this principle, that where the cause of action is incomplete, even though that which is necessary to complete it be costs only, the debt is not provable under the commission. [*Dallas* C. J. In most of those cases the Defendant was sued on a tort.] The judgments do not appear to have been affected by that circumstance, but to have turned on the principle that the demand was incomplete. *Bouteflour* v. *Coats* (e) is contrary to law and practice; for costs are never proved under a commission when the verdict is after the bankruptcy, (*Ex parte Hill.*) In *Ex parte Charles* there was a verdict before the bankruptcy; but the case of the Plaintiff is stronger, for here the verdict is after the bankruptcy. *Cockerill* v. *Owsten* (f) is almost in point; and the case of *The Overseers of St. Martin's in the Fields* v. *Warren* (g) shows clearly, that an unliquidated demand arising on a bond cannot be proved as a debt under the commission.

Pell Serjt., in support of the rule, relied on *Bouteflour* v. *Coats* as in point, and on *Scott* v. *Ambrose* (h). In *Cockerill* v. *Owsten* it did not appear that the bond was forfeited at the time of the bankruptcy; and in *St. Martin's in the Fields* v. *Warren*, which was a case on a bas-

(a) 11 *Vesey*, 646.
(b) 14 *East*, 198.
(c) 1 *Marsh*. 346.
(d) 2 *M. & S.* 70.
(e) *Cowp.* 25.
(f) 1 *Burr*. 436.
(g) 1 *B. & A.* 491.
(h) 3 *M. & S.* 326.

tardy

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tardy bond, it would have been necessary to assign breaches, whereas in the present case the amount of the original debt was known and ascertained. Under the 5 *Geo.* 2. *c.* 30. the Defendant was entitled to be discharged from all debts due and owing at the time of the bankruptcy: if he could be discharged from the original debt, why not also from this substituted debt?

DALLAS C. J. The debt was contracted with certainty before the bankruptcy of the Defendant, and therefore might have been proved under the commission. The case of *Bouteflour* v. *Coats* is directly in point, and has never been overruled or questioned in any subsequent decision; and *Scott* v. *Ambrose* has decided that the costs bear relation to the original debt. The rule must be made absolute.

BURROUGH J. The case *Ex parte Charles* has no application to the present. If this had been an action of trover, the case might have been different, but the debt, for which the defendant was sued, is one which is clearly barred by his certificate.

RICHARDSON J. The substance of the action on the bail-bond is the same as that on the original debt; the costs are accessorial, and the hardship upon the Plaintiff is not greater than in many other cases which arise unavoidably under the bankrupt laws.

Rule absolute.

BRANDON and BROWN *v.* HUBBARD and KEYS.

May 2.

A replevin clerk, who is partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, though it be prepared at the office of the firm.

ASSUMPSIT against the Defendants for work and labour done for them by the Plaintiffs. It appeared on trial at the last *Stafford* assizes, before *Holroyd* J. that the Plaintiffs (attornies) were partners, that *Brandon* had been appointed, solely, replevin clerk to the sheriff, but that the business of the replevin clerk was transacted in the office of *Brandon* and *Brown*. A replevin bond (for the costs of preparing which, among other things, the present action was brought) was filled up, the stamp provided, and other business relating to the same, done for the Defendants, in the office of *Brandon* and *Brown*. The counsel for the Defendants objected that there was a misjoinder; for that *Brandon* alone being the replevin clerk, was alone interested in this suit. *Holroyd* J. thought the objection well founded, and nonsuited the Plaintiffs; but gave leave to move to enter a verdict for them for the amount of the costs of preparing the replevin bond, &c. Accordingly, *Peake* Serjt. now moved to set aside this nonsuit, and enter a verdict for the Plaintiffs. He contended that the statutes 1 and 2 *Ph. & Mar. c.* 12. *s.* 3. and 11 *Geo.* 2. *c.* 19. *s.* 23. (the only statutes relating to replevin clerks) contained no directions about the remuneration to the sheriff, or as to the person who should prepare the replevin bond. If, therefore, the bond was prepared by two partners, the expenses were as much the debt of one as of the other, though one only held the appointment of replevin clerk. If an action had been brought for any matter relating to the stamp, both would have been liable. He cited *Willett* v. *Chambers* (*a*), as the only case bearing on the subject.

(*a*) *Cowp.* 814.

Sed

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Sed per Curiam. There is no doubt in the case. It was the duty of *Brandon* alone to make out the replevin bond, and *Brown* had nothing to do with it. The Defendants dealt with *Brandon* in his capacity of replevin clerk, and not as the partner of *Brown*.

Peake took nothing by his motion.

May 4.

HALFORD *v.* DILLON. (*a*)

DALLAS C. J.

1. By a settlement made on the marriage of Sir *H. J. P.* the estate *T.* was settled to the use of Sir *H. J. P.* for life, remainder to his first and other sons in tail male, reversion to Sir *H. J. P.* the settlor, in fee. There was issue of the marriage a son, *J. P.*, who attained the age of twenty-one, but died in 1767 without issue, leaving Sir *H. J. P.*, his father, him surviving. *J. P.* took upon himself, among other things, to devise the estate *T.* to his father for life, with remainder to his sisters of the half-blood, *M.* and *A.* in fee. Sir *H. J. P.* accepted certain benefits under this will; and in 1769 devised the estate *T.* (after the deaths of his daughters *M.* and *A.* without issue male) to *H. P.* for life, with several remainders over. In an action of replevin, by a person claiming under the will of Sir *H. J. P.*, the avowant, who claimed as heir of *A.*, read in evidence the answer of the real Plaintiff to a bill filed against him by the avowant, in which answer the real Plaintiff admitted that he believed that certain articles of agreement between Sir *H. J P.* and his son *J. P.* were made in the year 1766, whereby *J. P.* agreed to pay 700*l.* and an annuity of 200*l.* *per annum* to his father, who, in consideration thereof, agreed to convey estate *T.* immediately to his son, subject to a proviso, that if the son should die in the lifetime of the father, the conveyance was to be wholly void: Held, that Sir *H. J. P.* was not, by accepting benefits under the will of *J. P.*, divested of the reversion in estate *T.*; that *M.* and *A.* took nothing in the estate under the will of *J. P.*; and that, on the trial, it was not necessary for the Judge to direct the jury to presume, that some conveyance of the reversion in fee had been made by Sir *H. J. P.* to his son *J. P.*

2. The letters of a party, under whom the Plaintiff did not claim, were held inadmissible as evidence to affect the Plaintiff's title.

THIS was an action of *replevin*, brought by the Plaintiff for taking and detaining his goods. The Defendant avowed in the common form for certain rent of the *locus in quo* and other premises, which he alleged

(*a*) The facts and argument in this case are so sufficiently stated in the judgment of the Court, that it was deemed unnecessary to report them at greater length. *Lens* Serjt. shewed cause against the rule, which was obtained and supported by the Defendant in person.

to

to have been holden by the Plaintiff as tenant to the Defendant. The Plaintiff, by his plea in bar, denied the holding *modo et formâ;* whereupon issue was joined, and at the trial (*a*) a verdict was found for the Plaintiff. The Defendant has moved for a new trial.

The Plaintiff's farm was demised to him in 1805, by *Ann Parker*, by lease to hold from the 29th of *September*, 1805, for fourteen years. *Ann Parker* died in *January*, 1814, and the Defendant was her *heir at law*. The real Plaintiff in the action was Sir *William Parker*, Bart., to whom the Plaintiff *Halford* had attorned and paid his rent; and the question was, whether *Ann Parker* was tenant in fee of the premises under the will of her brother of the half blood, *John Parker*, Esquire, as the Defendant contended; or tenant for life only, under the will of her father, Sir *Henry John Parker*, Bart., as was contended on the part of the Plaintiff. By indentures of lease and release, bearing date the 1st and 2d of *October*, 1741, and made on the marriage of Sir *Henry John Parker*, the father, with *Catherine Page*, the *Talton* estate (whereof the premises in question formed a part) was settled to the use of Sir *Henry John Parker* for life, with remainder to his first and other sons in tail male, with reversion to the settlor in fee.

There was issue of this marriage one son, *John Parker*, who attained the age of twenty-one, but died in 1767 without issue, leaving his father, Sir *Henry John Parker* him surviving. Sir *Henry John Parker*, therefore, (unless he had done some act to deprive himself of the reversion in fee retained to him by the settlement of 1741), having survived his only son, had power to dispose by his will of the reversion in fee; and he, by his will, bearing date the 10th day of *November* 1769, devised the *Talton* estate, after the deaths of his daughters

(*a*) Before *Richardson* J. *Worcester* summer assizes 1819.

Margaret

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Margaret and *Ann Parker* without issue male, to *Hyde Parker* for life, with remainder to his first and other sons in tail male, with remainder to *William Parker* (eldest son of Sir *Hyde Parker*) for life, with remainder to his first and other sons in tail male, with remainder to *William Parker* (now the said Sir *William Parker*, Bart., and eldest son of *William Parker*, the son of *Hyde Parker*) for life, with divers remainders over. And he declared it to be the true meaning of his will, that the above mentioned estate should, after the decease of his daughters *Margaret* and *Ann Parker*, without issue male, constantly go along with and descend into the right heir male of the *Parker* family in the manner he had limited the same; as such heir male would inherit his title, therefore, it was his will that such his estates and title should descend and be enjoyed together as long as might be, and the laws of *England* would permit.

Sir *William Parker*, Bart., therefore, the real Plaintiff, insisted, that, all intermediate persons being dead, he was now entitled to the premises in question under the will of Sir *Henry John Parker*.

Mr. *Dillon*, however, contended that Sir *Henry John Parker* had no power to dispose, by his will, of the *Talton* estate, he being, as was contended, at the time of making his will, seised for life only of that estate. And this was contended on two grounds. First, That Sir *Henry John Parker*, having accepted certain benefits devised to him by the will of his son *John Parker*, (which *John Parker* had taken upon himself by the same will to devise the *Talton* estate to his father for life, with remainder to his sisters of the half blood *Margaret* and *Ann Parker* in fee,) had, thereby, elected to abide by and confirm his son's will in all parts; and that, by such acceptance and election, he was either actually divested of the reversion in fee reserved to him

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by the settlement of 1741, or else, that he and all persons claiming under him were estopped from setting up that settlement, or otherwise controverting the right of *John Parker* to dispose of the fee of that estate to his two sisters. Secondly, that the jury ought to have been directed to presume, that some conveyance of the reversion in fee had been made by Sir *Henry John Parker* to his son *John Parker*. On the first point, many equity cases respecting election, from *Noys* v. *Mordaunt* (*a*) to *Broome* v. *Monk* (*b*), were cited, from which it was argued, that the doctrine of election is a doctrine of the common law, and borrowed from thence by courts of equity; and that, although the interposition of a court of equity may, in certain cases, be necessary to compel a party to elect, yet, that when he has made his election to take under the will, and has accepted the benefit thereby given to him, (as was argued to be the case here), the aid of such a court was not necessary to divest him of any property which he held in repugnance to the will; but, that, in such case, he was *ipso facto* divested or estopped by the operation of the common law.

It was further argued, that, at the common law, a man may be estopped not only by record or deed, but also by matter *in pais*, as by the acceptance of an estate. And the Court was referred to *Littleton*'s chapter on Remitter, with Lord *Coke*'s commentary thereon, and to other authorities respecting the surrender of an old, by the acceptance of a new lease, for the purpose of shewing, that a man may lose his older and better title to an estate, by accepting a conveyance from another. (*c*)

And, finally, the Court was pressed with the authority of two more modern cases, *Goodtitle, dem. Edwards* v. *Bailey* (*d*) and *Doe dem. D. of Devonshire* v. Lord *George Cavendish*. (*e*)

(*a*) 2 *Vern.* 581.
(*b*) 10 *Ves.* 597.
(*c*) *Lit. s.* 667. *Co. Lit. ibid.*
(*d*) *Cowp.* 597.
(*e*) 4 *T.R.* 741. *notis.*

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As to the cases in equity, it appears to us, that the principle of them is entirely a principle of equity proceeding on the doctrine of an implied condition, of which a court of equity will enforce the performance, *viz.* by compelling the devisee, if he elects to take the benefit of the devise, to convey over his original estate, so that it may pass in conformity to the will. These cases seem to us to afford no authority shewing what the effect of such election is at the common law and without the aid of a court of equity.

As to the doctrine of estoppel, which forms an exception in certain cases to the doctrine of remitter, (as in the instance put by *Litt. s.* 664. where tenant in tail enfeoffs his heir of full age, who enters and survives his father, and is thereby estopped from claiming the estate tail *per formam doni*,) and also as to the doctrine of surrender of a lease by the acceptance of a new one, (as when a man, having a lease for twenty years, accepts from the same lessor a new lease for ten years, and is thereby estopped from claiming his old lease for twenty years,) all these are cases of two titles to the same lands, where a man, by accepting a new and inconsistent title, is precluded from setting up his older and better title to the same lands. It is obvious, that these cases fall very very short of proving the point now contended for, and indeed have no application to it; the point being this, that a man, by accepting a title to *Blackacre*, is thereby divested or estopped from setting up his former title to *Whiteacre*.

As to the cases of *Goodtitle* v. *Bailey*, and *Doe* v. Lord *George Cavendish*, in the first, the Court thought, that the release might well be construed as a grant of the reversion; which alone was sufficient to sustain the nonsuit: and, in the second, that the power was well executed, *in toto*, or, at all events, to the extent of giving to Lord *George Cavendish* an estate for life; in either of

which

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which cases the lessor of the Plaintiff could have no right to recover. It is true, that the Court, in the reports of those cases, appears to have thrown out more than was necessary for the decision, and more than perhaps is consistent with the strict legal view in which the action of ejectment is now regarded. These cases occurred at a time when that action was considered as a fictitious action, in which a different sort of title would suffice than what is required in a real action; and when it was thought that an equitable title would be sufficient to support or to defend an action of ejectment, contrary to the legal right of possession. That the Court, in these cases, had in view the equitable title, which was then thought sufficient in ejectment, and not the strict legal title, is manifest from what Lord *Mansfield* is reported to have said in considering the doctrine of election, in *Doe* v. Lord *George Cavendish*, *viz.* "They (namely the late Duke's children) claim great property under the Duke's will, and have taken it. If they reject his will they must renounce all benefit under it. Therefore they are bound to suffer a recovery, or make the title complete." His Lordship seems to consider that the obligation on the party to suffer a recovery and complete the title is, for the purpose of an ejectment, equivalent to a recovery actually suffered and the title completed.

But this doctrine has been overruled by the cases of *Doe dem. Hodsden*, v. *Staple* (*a*), *Goodtitle dem. Jones*, v. *Jones* (*b*), and *Doe dem. Da Costa*, v. *Wharton* (*c*), and by the constant practice of courts of common law for these last thirty years.

As to the second point contended for by Mr. *Dillon*, namely, that the jury ought to have been directed to

(*a*) 2 *T. R.* 684. (*b*) 7 *T. R.* 47.
(*c*) 8 *T. R.* 2.

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presume, that some conveyance of the reversion in fee had been made by Sir *Henry John Parker* to his son *John Parker*, Mr. *Dillon* read in evidence at the trial, the answer of Sir *William Parker* to a bill filed against him by Mr. *Dillon*, in which answer Sir *William Parker* admits, that he believes that certain articles of agreement between Sir *Henry John Parker* and his son *John Parker* were made in the year 1766, whereby the said *John Parker* agreed to pay 700*l.*, and also an annuity of 200*l.* *per annum* to his father; and his father, in consideration thereof, agreed to convey the *Talton* estate immediately to his son, subject to a proviso, that if the son should die in the lifetime of the father, the said conveyance was to be wholly void.

Mr. *Dillon* from that admission argued, not only that it is to be presumed that such a conveyance was in fact made, but, that it must be presumed to have been a conveyance operating according to the common law, whereby the freehold would pass to the son, subject only to a condition whereby the father was to be entitled to enter in the event of his surviving his son; and, if so, then Mr. *Dillon* further argued, that it could not be presumed that the father had made an entry to enforce the condition broken.

To this argument it appears to us that a short answer may be given. If it is to be presumed that any conveyance was in part executed, it should be presumed that it was such a conveyance, as would best effectuate the intention of the parties. Now the intention clearly was, that in the event, which has happened, of the father surviving the son, the conveyance was to be wholly void, and this intention might have been effectuated by a conveyance operating under the statute of uses, whereby, in the event contemplated, the use would have been revested in the father, without the necessity of any entry.

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On this short ground, therefore, without considering other grounds, we think no such conveyance can be presumed as would enable the son to dispose of the fee by his will.

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Another question was made by Mr. *Dillon*, whether certain letters written by Sir *William Parker*, the father of the present Sir *William Parker*, ought not to have been admitted in evidence?

On this point we think it sufficient to say, that it does not appear to us, that the present Sir *William Parker* claims under the late Sir *William Parker*; and, therefore, we think that the letters of the former cannot be evidence to affect the title of the latter. On all these grounds we are of opinion that the rule for the new trial must be

Discharged.

DRAKE *v.* ROGERS and PULLAN.

May 5.

The memorial of an annuity deed stated the consideration to consist of Bank of *England* notes payable on demand, and of a draft, payable at a bankers, without specifying the time when. The annuity had been paid eleven years, and the attesting witness and agent of the grantee were both dead. The Court set aside the securities on the ground that the memorial did not state when the draft was payable, or whether it had been in fact paid.

THE memorial of an annuity after reciting the indenture by which it was granted, stated the consideration of the annuity to be, "the sum of 85*l.* in notes of the governor and company of the Bank of *England* payable to bearer on demand, and also the sum of 65*l.* by a draft bearing even date herewith drawn by *John Moore*

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of No. 50, *Great Marlborough Street*, gentleman, on, and payable at Messrs. *Birch*, *Chambers*, and *Hobbs*, bankers, *Bond Street*, *London*, to *Thomas Rogers*, in his own person (by and with the privity and consent of *Benjamin Pullan* testified by his executing the said indenture) well and truly paid by the said *John Drake*, *immediately before* the execution of the said indenture, the receipt whereof the said *Thomas Rogers* did thereby acknowledge, and of and from the same and every part thereof did thereby acquit, release, and for ever discharge the said *John Drake*, his heirs, executors, administrators, and assigns and every of them."

Rogers was an under-graduate of *Cambridge*. The annuity was granted by the Defendants in 1808 for their lives, and the life of the longer liver of them, and secured by a warrant of attorney to enter up judgment for 300*l*. *John Moore*, who had acted as *Drake*'s agent, and *Luke Nayler*, the only attesting witness, died, the former in 1814, the latter in 1818. The annuity was paid up to the 31st *May*, 1819.

Judgment had been entered up on the warrant of attorney on the 19th *October*, 1808, as of the then preceding *Trinity* term.

Blosset Serjt. in the last term had obtained a rule *nisi* to set aside the judgment signed upon this warrant of attorney, and to stay execution, on the ground, that the memorial did not set forth when the draft for 65*l*. therein mentioned was payable, or whether it ever had been really paid. He cited *Rumball* v. *Murray* (*a*), *Berry* v. *Bentley* (*b*), and *Poole* v. *Cabanes* (*c*).

Onslow Serjt. now shewed cause against the rule. In *Rumball* v. *Murray* and *Berry* v. *Bentley* it appeared

(*a*) 3 *T. R.* 298.
(*b*) 6 *T. R.* 690.
(*c*) 8 *T. R.* 328.

clearly

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clearly that the checks had not been paid before the execution of the indenture. *Eyre* C. J. in *Morris* v. *Wall* (*a*) laments that such a decision as took place in the above cases should ever have been come to; and in *Ex parte Maxwell* (*b*), Lord *Kenyon* refused to set aside an annuity where the witnesses were dead and the annuity had been paid seven years, intimating, that by analogy to cases under the statute of limitations, the objection should be made within six years. In the present case the witnesses are dead, and the parties have lain by for twelve years. In *O'Callaghan* v. *Ingilby* (*c*) the consideration was stated to have been paid "*at* or *before*" the execution of the deeds, and held good. Here it is said to have been paid "*immediately before*;" which is a much stronger expression than any which those cases contain. The Court cannot now be called on to infer that the sum of 65*l.* mentioned in the memorial was a draft not turned into cash. A banker's check is commonly considered as money. *Ex parte Michell* (*d*).

Blosset Serjt., in support of his rule. The annuity was here granted by an under-graduate, and a time has elapsed since the grant of it, sufficient to repay the consideration-money, principal, and interest, over and over again. But the legal objection is that which was stated on moving for this rule. The draft is described as *payable* (a word importing something future) at the house of Messrs. *Birch* and Co. It is not the money, but the draft, which is said to be paid immediately before the execution of the indenture. This distinguishes the present case from *Rumball* v. *Murray*, and *Berry* v. *Bentley*, for in those cases the consideration is stated to have been *paid*. The decision in *Morris* v. *Wall* is in

(*a*) 1 *B. & P.* 208.
(*b*) 2 *East*, 85.
(*c*) 9 *East*, 135.
(*d*) 2 *East*, 137.

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favour of the Defendants. If it were sufficient to state, that the grantee paid partly by money and partly by draft, (the time at which the draft is payable, not being mentioned,) a door would be opened to every species of imposition, as the draft might never be paid, or paid at such a distance of time that the discount might materially diminish the consideration agreed upon. The view, therefore, taken by the Courts of this subject is correct. The other cases cited do not apply. In *Ex parte Maxwell* the consideration was stated to have been paid on the day of the date of the annuity-deed. *Ex parte Michell* only shews that if the consideration be paid in money before execution of the deeds, the annuity will be valid. As to *O'Callaghan* v. *Ingilby* the sum was there stated to be paid in hand.

DALLAS C. J. This is an objection which ought not to be encouraged. The grantor, at the distance of twelve years from the execution of the deed, at a period when all the witnesses who could have spoken to the transaction, are dead, raises his objection for the first time. It is no answer to say, that the principal has been paid as well as the interest, for that may be the case with all annuities; they are granted upon the chance of life, and if the grantor had died within a year, the grantee would have lost all. As little weight is there in the observation, that this was a transaction entered into with a person in early life; because upon every principle of honesty and justice *he* should be the less disposed to come here to set it aside. This case may be considered upon two grounds, on principle, and on authority: and, as to the authorities, it is now too late to lament the turn which the cases have taken; for, so often have matters of this sort been decided, that even in the time of that eminent person who regretted the result of the decisions, the law was settled as clearly

as

as it ever can be. Now with regard to the principle, it is objected here that the memorial does not state when the draft for 65*l.* was payable, or whether it was ever paid, so that it is uncertain whether the grantor of the annuity ever received the whole of the consideration for it. In principle there is a reason why it should appear upon the face of the memorial when the draft was payable, and that reason is given in *Berry* v. *Bentley*. "The objection was, that the memorial did not set forth when the note was payable, whether immediately or at a distant day; for if at a distant day, it was not worth 700*l.* by reason of the discount." Now the draft in this case might have been payable at a distant day, and the grantor might have lost so much of his consideration as the discount of the draft for the intermediate time might amount to. In substance, therefore, and on principle here is a ground why the time at which a bill is payable should appear on the memorial.

This brings me to the cases which have been decided; but before I enter on them I will revert to the language of this memorial: it is, "that in pursuance of the said agreement, and in consideration of the sum of eighty-five pounds in notes of the governor and company of the Bank of *England* payable to bearer on demand, and also of the sum of sixty-five pounds by a draft bearing even date herewith, drawn by *John Moore* of No. 60, *Great Marlborough Street*, gentleman, on, and payable at Messrs. *Birch*, *Chambers*, and *Hobbs*, bankers, *Bond Street*, *London*," (without saying when) "to the said *Thomas Rogers* in his own person, (by and with the privity and consent of the said *Benjamin Pullan*, testified by his executing the said indenture,) well and truly paid by the said *John Drake* immediately before the execution of the said indenture, the receipt whereof the said *Thomas Rogers* did thereby acknowledge," — Now

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what does he acknowledge? Not the receipt of the money, but of the draft. That leaves the objection where it was, namely, whether it is necessary on principle and on the decided cases, that the memorial should express the time when the draft is payable: and there are cases directly in point. First *Berry* v. *Bentley:* then *Poole* v. *Cabanes*; and that case is much stronger than the present, for there it appeared on the memorial, that the draft was duly honored; but the third objection taken was, that the consideration was not sufficiently stated in the memorial. *Gibbs* produced an affidavit that the annuity had been regularly paid seven years; that the party who drew the draft was dead; and then insisted that this objection ought not to be made, when the only person, who could disprove it, was dead: upon which the Court were about to discharge the rule, when *Lawes* observed that the last objection appeared on the memorial itself, where it was stated that part of the money was paid by a banker's check, without setting forth the time when the check was payable, and referred to *Berry* v. *Bentley*. *Gibbs* then said a banker's check was always considered as money, and that the payment in *Berry* v. *Bentley* was made by a promissory note. But the Court thought that was immaterial, and the rule was made absolute, the defendants agreeing to return the principal on taking an account before the Master. It appears to me from these two cases, and also upon principle, that it is necessary to state in the memorial at what time a bill or draft given as part of the consideration was payable. But, before coming to a decision, I will look into *O'Callaghan* v. *Ingilby*.

Cur. adv. vult.

The Court on the next day made the rule absolute, but imposed on the Defendant the condition of return-

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ing the principal on taking an account before the Prothonotary.

Rule absolute.

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HALE v. SMALL and Others.

May 10.

Held, that evidence of a dealing in hops was properly admitted in a cause brought to try the validity of a commission of bankrupt describing the Plaintiff as *dealer in cattle*, seeking his trade of living by buying and selling.

A COMMISSION of bankrupt described the Plaintiff as "*Edward Hale*, of *West Worldham* in the county of *Southampton*, *dealer in cattle*, using and exercising the trade of merchandise, by way of bargaining, exchange, bartering and chevisance, seeking his trade of living by buying and selling." The Plaintiff, in order to try the validity of the commission, sued the Defendants (assignees under the commission) in trespass for taking his goods. At the trial before *Wood* B., (*Winchester Spring* assizes, 1820) evidence of a dealing in hops was tendered, to prove the trading of the Plaintiff; the evidence was objected to, but admitted, and was the only evidence of a dealing. Verdict for the Defendants. This was the third trial; the first verdict having been given for the Defendants, the second for the Plaintiff, and the last new trial having been granted on the ground that the Plaintiff might have been taken by surprise, by evidence of a dealing in hops, after being described in the commission, as a dealer in cattle.

Onslow Serjt. had obtained a rule *nisi* to set aside this verdict and have a new trial, on the ground, among other objections, that under the terms of this commission, the evidence tendered at the trial was improperly admitted.

Pell

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HALE v. SMALL.

Pell Serjt., on shewing cause, cited *Ex parte Herbert* (a), as in point, and contended, that it was not necessary to state in the commission any specific manner of dealing, but merely to pursue the words of the statute, which this commission had done, by describing the Plaintiff as one who gained his living by buying and selling. There might be a convenience in giving the bankrupt notice, by specifying some trade; but he would be as little assisted by the common description of dealer and chapman, as by the mention of a trade which he did not exercise. A decision had been pronounced by the Lord Chancellor in this very case, in which his Lordship had refused to amend or set aside the commission.

Onslow, in support of his rule, urged, that the Lord Chancellor's decision in this case, only proved that he would not amend a commission, which in fact he never did, after it had been acted upon; but it did not follow that the commission was valid because the Chancellor would not amend it. It would be of mischievous consequence if a false description or no description of the party were given in the commission, and an extraordinary departure from the usual form.

DALLAS C. J. In this commission the Plaintiff is thus described, "of *West Worldham* in the county of *Southampton*, dealer in cattle, using and exercising the trade of merchandise, by way of bargaining, exchange, bartering and chevisance, seeking his trade of living by buying and selling." He is described not only as a dealer in cattle, but as a person gaining his livelihood by buying and selling. It is necessary now to consider whether the expression "dealer in cattle," is descriptive of the bankrupt's person, or of his trade, and if it

(a) 2 *Ves.* & *B.* 399.

be

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be descriptive of his trade, whether it may not be rejected as surplusage. It was contended, that evidence of a trading ought not to have been admitted under such a description; and when this came before the Court on a former occasion, they thought it might be a surprise upon the party, if the Defendants were to set up evidence of a trading in hops, as the only trading on which the bankruptcy rested, after having described the Plaintiff as a dealer in cattle. They did not go the length of saying, that the commission was therefore invalid, but thought grounds were laid for sending the case down to a new trial, lest there should have been any surprise on the Plaintiff. I still think that it may be a source of inconvenience to describe a party as acting in one capacity, and then to offer evidence of his acting in another and a different capacity.

When the cause was sent down a second time for trial, all objection on the ground of surprise was removed; for it was known, that evidence would be set up to establish a dealing in hops; and the only question now is, whether the description of a dealer in cattle having been inserted, and the expression of dealer and chapman having been omitted, the statement that the party gained his living by buying and selling is sufficient. How then does the matter stand on reason and principle? what clearer information does the party receive from the expression dealer and chapman, than would be conveyed to him by the description used in the statute (a), namely, a person gaining his livelihood by buying and selling. My Brother *Park* expressed himself in these terms, when the question was last raised in this court. "The general statement that the bankrupt got his living by buying and selling, will admit the finding of any particular trading."(b) Here, if

(a) 13 *Eliz.* c. 7. s. 1. (b) 3 *B. Moore*, 58.

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the term *dealer and chapman*, or in the absence of that, if the term *buying and selling* would entitle the Defendants to prove any trading, then the question is, whether the naming a particular trade would operate to exclude such general proof. In *Ex parte Herbert*, the Lord Chancellor held, that the general allegation of buying and selling was sufficient to render the commission valid; and the only difference between that case and the present is, that there the question was, as to the sufficiency of the general words, here the question is as to the admissibility of general evidence under those words. It appears to me, therefore, that the words *dealer in cattle* are descriptive of the person only, and as such not material, while the words *buying and selling* as descriptive of a trader, are sufficient to render the commission valid, and to admit evidence to prove any act of trading.

BURROUGH J. The language of the act is, " any merchant or other person using or exercising the trade of merchandise by way of bargaining, exchange, re-change, bartry, chevisance, or otherwise in gross or by retail, or seeking his or her trade of living by buying and selling."(a) The expression *dealer and chapman* does not exist in any of the acts touching bankrupts, and only found its way into commissions, to enable the parties to prove a general trading. But I am still of opinion, that some description of the person is necessary; " Esquire" would be sufficient, if *using trade by buying and selling* were added; but some description is necessary; and when that has been formally given, there is no objection to letting in evidence of any kind of trading. A man has been described as a waterman, in which capacity he was not subject to the bankrupt laws: but

(a) 13 *Eliz. c.* 7. *s.* 1.

that

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that being merely descriptive of the person, the parties were allowed to go on and prove a trading. So here, though the Plaintiff was personally described as a dealer in cattle, it was competent to the defendants under the general words to prove any species of trading. I think, therefore, the dealing in hops was properly admitted in evidence under this commission.

RICHARDSON J. I am of the same opinion. When this was first before the Court it was objected, that a dealing in hops could not be proved under this commission, and it struck the Court that there were no commissions, in which the words *dealer and chapman* were not introduced; but they gave no opinion on the effect of the omission. Upon considering the subject it seems to them, that the general words here convey every information, and satisfy every point that *dealer and chapman* would. In common cases some particular trade is usually prefixed, as "silk mercer, dealer and chapman;" but it could not be doubted, that under such expression, evidence might be admitted to show that the party was a general merchant. I think, the same may be done here, under words which in meaning are equivalent to *dealer and chapman*, and more authorised by the language of the statute.

Rule discharged.

1820.
May 3.

Gray v. Shilling.

By the 2 G. 3. c. 67. (local act,) under which a turnpike gate was erected at L., the toll, when carriages passed, was imposed on the carriages, not on the horses drawing them; and persons having paid on passing, were, on their return the same day, exempt from toll. By the 49 G. 3. c. 28. (local act,) applying to the same turnpike, and reciting the former act, the old tolls were repealed, and the new toll, when carriages passed, was imposed, not on the carriages, but on the horses drawing them: In the latter act, all the provisions, regulations and clauses of the former were continued as fully as if they had been re-enacted: Held, that where the toll imposed by the latter act, had been paid for horses passing with a carriage, those horses were exempted from toll on returning the same day, though with a different carriage.

THE declaration stated, that a certain toll-gate, situate in the parish of *Lamberhurst*, in *Kent*, commonly called *Lamberhurst Pound Gate*, standing upon and across a certain public highway in the said parish, was a gate erected by virtue of the stat. 2 *G.* 3., and that the Plaintiff, after the passing of that act, and after the passing of the 49 *G.* 3., to wit, on, &c. at, &c. were lawfully possessed of four horses, which then and there drew a certain coach of the Plaintiff, in and along the highway and through the toll-gate; and that for their so passing through the same, the Plaintiff paid to the Defendant, being the toll-gate keeper, appointed to collect the tolls at the said gate, the toll by him demanded and due in that behalf, by force of the statute, &c. and obtained and received from the Defendant, so being such toll-gate keeper, a proper and sufficient ticket, denoting the due payment of such toll, and that afterwards and before 12 o'clock at night of the same day, the same horses were lawfully drawing another and different coach of the Plaintiff's in and along the highway and near to the gate, for the purpose of passing through the same free of toll, and, for that purpose, the Plaintiff then and there presented and shewed the Defendant the ticket, and demanded permission of the Defendant, as such toll-gate keeper, to pass through the gate with the horses and the last mentioned coach free from toll, according to the statute, &c., yet, that the Defendant would not suffer the horses, with the last mentioned coach, so to pass through the toll-gate free of toll, but wholly refused, and on the contrary thereof, falsely pretended that a toll of one shilling and fourpence was

due

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due and payable to the Defendant under and by virtue of the statute, and injuriously fastened the gate, and kept the same fastened for one hour, and thereby wrongfully stopped and detained the horses and last mentioned coach, and prevented the same from passing through, until the Plaintiff paid to the Defendant the sum of money so pretended to be due and payable as aforesaid, contrary, &c. By means whereof Plaintiff was injured, &c.

General demurrer and joinder.

Taddy Serjt. in support of the demurrer. The question is, whether under the 49 *G.3. c.28.* (*a*) horses, which have

(*a*) By the 2d *G.* 3. *c.* 67. (local act) it is enacted, that from and after the 1st of *June*, 1762, it shall be lawful to and for the trustees, &c. appointed to put that act in execution, &c. to demand and take the several tolls and duties thereinafter mentioned, instead of the tolls and duties laid and made payable by the act of the 14th of his late Majesty, before any cattle or carriage whatsoever shall be permitted to pass through any bar, &c. to be erected by virtue of this act on any part of the roads leading from *Kipping's Cross* to *Lamberhurst Pound*, &c. viz.

For every coach, &c. (the tolls therein mentioned.)

For every waggon, &c. (the tolls therein mentioned.)

For every horse, &c. laden or unladen, and not drawing, (the toll therein mentioned.)

Provided, &c. that no person or persons having paid the tolls or duties hereby directed to be paid at any of the gates, &c. erected by virtue of this act, through which such person or persons shall pass with any horse, &c., and producing a ticket, &c. that such toll was paid, (which ticket, &c. the collector, &c. is hereby required upon demand to give,) shall be liable to pay again for returning ever so often through the same gate, &c. the same day, or before 12 of the clock at night, with the same horse, &c. But if any person or persons shall pass the same day through the said turnpike, a third time, with any carriage whatsoever (with wood for firing excepted), then such person or persons shall be liable, &c. to pay the said toll or duty hereby imposed on such respective carriage, and to receive another ticket, &c. which shall entitle him or them to return through the same gate, with the same carriage, upon the same day, once more toll-free; and so, *toties quoties*, for every third time the said person or persons shall pass the same day through the same gate, &c. with the said carriage, as aforesaid.

By the 49 *G.* 3. *c.* 28. (local act,

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have passed through this gate, are exempt from toll on returning the same day. The 2d of *Geo.* 3. *c.* 67. (to which the 49th refers) where carriages pass, imposes the toll on carriages, not on horses drawing them, and exempts persons from toll on their return the same day: the 49th imposes the toll, when carriages pass, on the horses drawing them, and orders that all the provisions of the 2d, shall be re-enacted and continued. The question, therefore, is, whether the exemptions of the 2d are re-enacted in the 49th. Now there are some exemptions from toll specified in the 49th, but horses on their return are not mentioned among these exemptions, and where some exemptions are mentioned, others cannot be implied; the exemptions in the first act, therefore, only apply to the last, where they can stand without alteration; for they are continued, but not changed; and where a carriage passes, it is the carriage that is exempted by the old act, not the horses drawing it.

act, applying to the same turnpike, and reciting the former acts,) it is enacted, That all, &c. the tolls granted, &c. by the said recited acts to be taken on the said roads, shall, from and after the second *Monday* next after the passing of this act, be, and the same are hereby repealed; and that, instead thereof, there shall be demanded and taken at all, &c. the gates, &c. erected, &c. by virtue of the said recited acts, or this act, the several tolls following, viz.

For every horse, &c. drawing any carriage, the sum of four pence.

For every horse, &c. laden or unladen, and not drawing, the sum of one penny.

And it is further enacted, That the said recited acts, and all and every the powers, authorities, provisions, regulations, penalties, forfeitures, clauses, matters and things, therein respectively contained, except such as relate to exemptions from stamp duties, and except such as are hereby varied, altered, or repealed, shall be, and they are hereby further continued for and during the term hereinafter mentioned, as fully and effectually, to all intents and purposes, as if the same were repeated and re-enacted in the body of this act, but subject, nevertheless, to the amendments, alterations, variations, and additions, herein contained.

Bosanquet

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Bosanquet Serjt., *contrà*. The Court will not impose a duty unless there are the clearest grounds for doing so. By the 2d of *Geo.* 3. persons returning the same day, whether with horses or carriages, were exempt from toll. Though if the carriages passed a third time they were liable to a second toll. The new act lays the duty upon the horses, but re-enacts and continues the provisions of the old act. The carriage, therefore, forming no object of the provisions in the new act, the horses may be exempted on their return, by virtue of the clause in the old act exempting persons returning with horses. If any such alteration had been intended, as that carriages or horses returning the same day should pay a second time, it would have been mentioned. *Williams* v. *Sangar* (a) is in point.

Taddy, in reply. *Williams* v. *Sangar* was a case on a different act of parliament, and does not apply here. The exemptions of 2 *Geo.* 3., if re-enacted, do not include the present case.

DALLAS C. J. In this case the party is clearly exempted from toll. The point is decided in *Williams* v. *Sangar*. There, the duty was imposed on carriages drawn by horses. The duty being laid on carriages, and a carriage returning the same day being exempt from toll, it was held that no toll could be exacted for a carriage returning the same day, though the carriage should return with different horses. That case, therefore, converting the objects of toll, is exactly applicable to the present. As to the clauses of exemption contained in the 2 *Geo.* 3., they are adopted and re-enacted by the 49 *Geo.* 3., unless expressly altered, and no alteration appears to have been contemplated by the legisla-

(a) 10 *East*, 66.

 ture.

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ture. This would have been our decision if there were no previous case, but *Williams* v. *Sangar* renders the matter perfectly clear.

BURROUGH J. The old clauses must be taken to be re-enacted in such a manner as to be applicable to the same subject. It is clearly provided that *persons* shall not pay on their return.

RICHARDSON J. The exemptions of the former act are applicable to the new subject-matter. Under the former act horses returning were not liable; in the latter there is no toll on carriages.

Judgment for the Plaintiff.

May 2.

MORLEY *v.* LAW.

A misnomer of the Plaintiff can only be taken advantage of by plea in abatement, and affords no ground for setting aside proceedings on motion.

CROSS Serjt. had obtained a rule to shew cause why the *testatum capias ad respondendum*, issued against the Defendant in this cause, and the several proceedings thereon, should not be set aside for irregularity, on the ground of a misnomer of the Plaintiff. She had sued as *Mary Morley*, her name being *Martha*.

Vaughan Serjt., who shewed cause against the rule, insisted that this objection could only be made by plea in abatement.

Cross, in support of his rule, cited *Wilks* v. *Lorck* (*a*), contending that a misnomer of the Plaintiff was to be treated in the same manner as a misnomer of the Defendant.

(*a*) 2 *Taunt.* 399.

But

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But the Court, referring him to the *Clerk of the Trustees of Taunton Market* v. *Kimberley* (a), and *Gardner* v. *Walker* (b), said that a misnomer of the Plaintiff could only be taken advantage of by plea in abatement. And the rule was

Discharged.

(a) 2 *Bl. R.* 1120. (b) 3 *Anstr.* 935.

GRIMES v. JOSEPH, a Prisoner.

May 3.

Where a prisoner, who had been charged with a declaration as of *Trinity* term, 1819, absconded during the long vacation, and did not return to custody till *Hilary* term, 1820, the Court would not discharge him, though the Plaintiff had not signed judgment by the end of *Hilary* term, 1820.

THE Defendant being in the custody of the warden of the *Fleet* was charged with a declaration at the suit of the Plaintiff, about the 22d of *July* last, as of the then preceding *Trinity* term. Shortly afterwards he caused himself to be removed from the prison of the *Fleet*, by a writ of *habeas corpus*, to the *King's Bench* prison, where he procured the rules, and about the 4th of *October* absconded to the continent, whence he did not return till *Hilary* term last. The Plaintiff, not having signed judgment up to the last day of *Hilary* term,

Vaughan Serjt., in this term, had obtained a rule to shew cause why the Defendant should not be discharged out of custody, as to the Plaintiff in this action, the Plaintiff not having proceeded to final judgment in due time.

Peake Serjt. now shewed cause against the rule, and contended that the Plaintiff was entitled to two terms after the time of the Defendant's return. If the Plaintiff had proceeded in the action, he must have demanded a plea of the Defendant, and served notices and rules on him, which, as the Defendant was abroad, the Plaintiff

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could not do. Even if he had entered up final judgment, he could not charge an absent party in execution.

Vaughan Serjt. in support of his rule, urged that the notices and rules might have been left with the turnkey, and that the gaoler was liable, if the prisoner was not ready to be charged in execution.

Sed per Curiam. The rule with respect to signing judgment within a certain time against prisoners, does not apply to such a case as the present; the object of the rule is to prevent unnecessary custody; here no custody was occasioned to the prisoner by the Plaintiff's omitting to sign judgment.

Rule discharged.

May 9.

LINGHAM v. WARREN and Others, Executors.

To an avowry by executors for rent due in the testator's life, it is no plea "That the testator levied a sufficient distress for the same rent," unless it be also averred that the rent was thereby satisfied.

DECLARATION in replevin for taking goods in a dwelling-house, avowry that the Plaintiff held the dwelling-house in which, &c. as tenant to the testator in his life-time, and from his death until the time when, &c. as tenants to the Defendants as executors, by virtue of a demise to the Plaintiff made in the life-time of the testator, under a yearly rent, payable quarterly; and because a year's rent was due from the Plaintiff to the testator in his life-time, and from the time of the death of the testator to the time when, &c. was due to the Defendants as executors, the Defendants well avow, &c.

Plea in bar, that the Defendants ought not to avow; because the testator, in his life-time, took and distrained, as a distress for the same identical rent in the avowry mentioned, divers goods and chattels of the Plain-

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Plaintiff, of sufficient value to satisfy and discharge the rent in the avowry mentioned, and therein supposed to be due, and in arrear, and unpaid to the Defendants as executors, and the costs of taking and keeping the said distress, (to wit) at, &c.; and this the Plaintiff was ready to verify, &c.

Demurrer and joinder.

Vaughan Serjt., in support of the demurrer. The mere circumstance of the testator's having taken a sufficient distress is no answer to the avowry for rent arrear, unless by that distress the amount of the rent was actually recovered. That does not appear on this plea; and many cases may be conceived in which the rent may not have been recovered, although a sufficient distress may have been taken; as where the distress has been replevied, and by the death of the party the suit has abated. *Lear* v. *Edmonds* (*a*) is in point.

Lawes Serjt., contrà. *Lear* v. *Edmonds* was the case of an action for use and occupation; and it was no answer to a demand for money, to say that a distress had been taken, without saying also that the money had been recovered. But the question here is, whether the landlord, having taken one distress, can proceed to take another; whether, even if the debt be not satisfied by the first distress, he is not driven to some other remedy instead of making a second distress. Here it is averred, that the first distress was sufficient; and where that is the case, the landlord cannot make a second. Before the 17 *Car.* 2. *c.* 7. *s.* 4. he could not make a second, even where the first was insufficient.

DALLAS C. J. This case, in principle, is not to be distinguished from *Lear* v. *Edmonds*. There are many

(*a*) 1 *B.* & *A.* 157.

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cases supposable, in which the taking a sufficient distress, might not produce a satisfaction of the rent.

Judgment for the avowants.

May 15.

HOLLIS SOLLY and SAMUEL SOLLY v. JOHN MURRAY FORBES and ABRAHAM FREDERIC DANIEL ELLERMAN.

A release was given by plaintiffs to *A.*, one of two partners, with a provision that it should not prejudice any claims which Plaintiffs might have against *B.*, the other partner; and that in order to enforce the claims against *B.*, it should be lawful for Plaintiffs to sue *A.*, either jointly with *B.* or separately. In an action by Plaintiffs against *A.* and *B.*, this release having been pleaded by *A.* and set out on oyer in the replication, with an averment that the action was prosecuted against *A.* jointly with *B.*, for the purpose of enabling Plaintiffs to recover payment of monies due from *B.* and *A.* to plaintiffs, either out of the joint estate of *B.* and *A.*, or from *B.* or his separate estate, the replication was demurred to, and the demurrer overruled.

DECLARATION for money paid by the Plaintiffs to the use of Defendants, for money lent, for money had and received by the Defendants to the use of the Plaintiffs, for work done and labour performed by the Plaintiffs as agents to Defendants, for interest upon monies lent by the Plaintiffs to the Defendants, and upon an account stated between the Defendants and the Plaintiffs.

Pleas; by *Forbes*, general issue; *Similiter* thereon. By *Ellerman*, general issue, a release, and a set-off. The replication craved oyer of the supposed release which was set forth verbatim, and which was in substance an indenture dated 20th *May*, 1819, between the Plaintiffs, both of the city of *London* merchants and co-partners in trade of the one part, and *Abraham Frederick Daniel Ellerman* late of *Hamburgh*, merchant, but then residing and carrying on trade in *Heligoland*, of the other part, by which indenture (after reciting that, up to the year 1806, *Ellerman* carried on the trade or business of a merchant at *Hamburgh*, and also at *Toningen*, in partnership with *John Murray Forbes* under the firm, at each of the last-mentioned places, of *Forbes* and *Ellerman*, and that there were various transactions of business between

Forbes

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Forbes and *Ellerman*, and the Plaintiffs; and that in or about the month of *March*, 1806, *Forbes* and *Ellerman*, having become embarrassed in their affairs, stopped payment, and that upon the balance of accounts between *Forbes* and *Ellerman* and the Plaintiffs, *Forbes* and *Ellerman* stood justly indebted unto the Plaintiffs, as co-partners in trade, in a considerable sum of money, the whole of which debt still remained unpaid and was then due and owing from *Forbes* and *Ellerman* to the Plaintiffs; and that *Ellerman* had lately offered and proposed to the Plaintiffs to pay to them in the manner thereinafter mentioned the sum of 3000*l*., if the Plaintiffs would give and execute unto *Ellerman* such release or discharge for or in respect of their aforesaid debt or demand on *Forbes* and *Ellerman* as thereinafter was contained;) it was witnessed, that in consideration of 600*l*. to the plaintiffs in hand paid by *Ellerman* immediately before the execution of those presents, the receipt whereof the Plaintiffs did thereby jointly and severally acknowledge, and also in consideration of twenty-four promissory notes of *Ellerman*, each for 100*l*. and each bearing date the 1st *April* 1809, and which twenty-four promissory notes were made payable to the Plaintiffs or their order successively, at one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four months date, (each of the said notes being numbered, and the number of each note corresponding with the number of months it had to run,) the receipt of which said twenty-four promissory notes (amounting together with the said sum of 600*l*. to the before-mentioned sum of 3000*l*. so agreed to be paid to and accepted by the Plaintiffs) the Plaintiffs did also thereby acknowledge; and pursuant to and in execution of the agreement thereinbefore recited on the part of the Plaintiffs, the Plaintiffs had, and each of them had, remised, re-

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leased, and for ever discharged, and by those presents, did, and each of them did, remise, release, and for ever discharge *Ellerman*, his executors, administrators, and assigns, of, from, and against all and all manner of actions and suits, cause and causes of action or suit, debt, sum and sums of money, accounts, bonds, bills, notes, contracts, agreements, promises, damages, claims and demands whatever, in law and in equity, which the Plaintiffs then had, or which they, or either of them, their, or either of their executors, administrators, or assigns, thereafter could, should, or might have against *Ellerman*, his executors, administrators, or assigns, for or by reason of any matter, cause, or thing whatsoever, relating to the premises, from the beginning of the world, to the day of the date of those presents, except, and subject nevertheless to the provisoes declarations or agreements thereinafter contained. Provided always nevertheless and it was thereby agreed and declared by and between the parties to those presents, and the true intent and meaning of them and of those presents was, that those presents or any matter or thing therein contained should not release, or be construed and taken to release, or in any manner to prejudice and affect any claims or demands which the Plaintiffs, or either of them, ever had, or then had, or which they, or either of them, or either of their executors, or administrators, thereafter could, should, or might have upon or against *Forbes*, either separately, or as a partner with *Ellerman*, or the executors, administrators, or assigns of *Forbes*, or upon or against the joint estate or effects of *Forbes* and *Ellerman*, in respect of the debt so due from *Forbes* and *Ellerman* to the Plaintiffs, or any part of such joint estate, or effects, whether the same should be in the hands of or recoverable from *Forbes* and *Ellerman*, or either of them, or any other person or persons whomsoever. Provided also, nevertheless, and it was thereby

thereby declared and agreed by and between the parties to those presents, and the true intent and meaning of them and of those presents was, that it should and might be lawful to and for the Plaintiffs, their executors, administrators or assigns, from time to time, when and as they, the Plaintiffs, their executors, administrators, or assigns, should be thereto advised, to commence and prosecute any actions, suits, or other proceedings, either at law or in equity, against *Ellerman* jointly with *Forbes*, or against *Ellerman*, his executors, administrators, and assigns, separately, for the purpose of recovering, or compelling, or of enabling the Plaintiffs, their executors, administrators or assigns, to recover or compel payment, or satisfaction of the debt, so due and owing from *Forbes* and *Ellerman*, to the Plaintiffs as aforesaid, either by or out of any the joint estate or effects of *Forbes* and *Ellerman*, or by or from *Forbes*, his executors, administrators, or assigns, or his separate estate or effects. Provided always nevertheless, and it was thereby lastly declared and agreed by and between the parties to those presents, and the true intent and meaning of them and of those presents was, that in case default should be made in the due payment of any two of the before mentioned promissory notes, successively to fall due, in such manner as that any two of the promissory notes should be due and unpaid at the same time, then and in such case those presents, and every matter and thing therein contained, should, from and immediately after such default, be absolutely void and of no effect, and the said sum of 600*l.*, and all or any other sums or sum of money, which might at that time have been paid, and also all or any other sums or sum of money which might at any time or times from and after such default, be paid, in discharge of any of the aforesaid promissory notes, should be carried to the credit of *Forbes* and *Ellerman* with the Plaintiffs, and all the rights,

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rights, claims and demands of the Plaintiffs, their executors, administrators or assigns, by reason or in respect of the debt thereinbefore mentioned to be due to them from *Forbes* and *Ellerman*, either upon or against *Forbes* and *Ellerman*, jointly or separately, their or either of their executors, administrators, or assigns, or any other persons or parties whomsoever, should from and immediately after such default be in full force and virtue (as to so much of the debt so due to the Plaintiffs as aforesaid, as should remain unpaid,) in like manner, to all intents, effects, constructions, and purposes, as if those presents had never been made, any thing therein contained to the contrary thereof in anywise, notwithstanding. In witness whereof, &c. A memorandum of which the following is the substance was then added, "This deed is deposited by *S. Solly* and *H. Solly* (the Plaintiffs) and by *G. B.* on the part of *Ellerman*, with *E. L.*, who is to deliver it to *Ellerman*, his executors or administrators, or his or their order, after due payment of the within mentioned twenty-four promissory notes, according to the tenor and meaning of the within written indenture, but in case of any default in payment of the promissory notes, or any of them, according to the tenor and meaning of the within written indenture *E. L.* is to deliver up the indenture to *S. Solly* and *H. Solly*, their executors or administrators, to be cancelled, and in the mean time the indenture is to remain in the hands of *E. L.* for the purposes aforesaid." — The replication then concluded thus, "Which being read and heard the Plaintiffs say that by reason of any thing by the Defendant *Ellerman* in his plea alleged they ought not to be barred from having their aforesaid action thereof against him because they say that *Forbes*, with whom the Defendant *Ellerman* is jointly sued in this action, and the said *Forbes* in the said supposed writing of release mentioned, are one and the same

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same person, and not other or different persons, and that the said *Forbes* is so sued as aforesaid, as a partner with the said *Ellerman* in respect of a certain part of the monies, in the said supposed writing of release mentioned to be due and owing from the said *Forbes* and the said *Ellerman* to the Plaintiffs, to wit, at, &c. And the Plaintiffs further say, that this action is prosecuted against the said *Ellerman* jointly with *Forbes* for the purpose of recovering or compelling, or of enabling the Plaintiffs to recover or compel payment or satisfaction of the monies so due and owing from the said *Forbes* and the said *Ellerman* to the Plaintiffs as aforesaid, either by or out of the joint estate or effects of the said *Forbes* and the said *Ellerman*, or by or from the said *Forbes*, or his separate estate or effects, to wit, at, &c. And this, &c. Wherefore, &c." As to the set-off the Plaintiffs replied that they were not indebted to the Defendant *Ellerman* in manner and form alleged, and as to that, put themselves on the country. *Similiter* thereon.

Demurrer, and
Joinder in demurrer.

Blossct Serjt. in support of the demurrer. First, the provisoes in this release are void, as being repugnant to the nature of the instrument. Secondly, the release cannot at any rate be taken advantage of in this manner, and the mode of pleading it here, is a departure from the declaration. Thirdly, no issue can be joined on the latter part of the replication, as it only avers what was the party's purpose.

On the first point the general principle is laid down by the Lord Chancellor in *Bradly* v. *Peixoto* (*a*). "Where there is a gift with a condition inconsistent with and repugnant to such gift, the condition is void;"

(*a*) 3 *Ves. jun.* 325.

and

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and a reference is there made to many cases in 2 *Danvers's Abr.* 22. To the same effect is *Moore* and *Savil's* case (*a*), and in the judgment of the Court in *Stukely* v. *Butler*, the principle of the rule is deeply considered. "A condition annexed to an estate given, is a divided clause from the grant, and therefore cannot frustrate the grant precedent, neither in any thing expressed, nor in any thing implied, which is of his nature incident and inseparable from the thing granted (*b*)." In *Roll's Abr.* 419. l. 25. and 418. l. 25. the same doctrine is laid down. From all which, it appears that if a proviso be inconsistent, either with the nature of the deed as expressed on the face of it, or as it is to be implied from the legal effect of the instrument, the condition is void.

Secondly, this is a departure. The declaration charges the two Defendants, and the replication seeks to charge only one. The Defendants were obliged to plead the release, for if they had not pleaded it, — if they had pleaded the general issue, — both would have been liable to judgment and execution. Equity would not have relieved, but would have said that the parties might have pleaded the release at law: and now in consequence of this plea, the Plaintiffs go for a claim very different from that set up by the declaration.

Thirdly, no issue can be joined on the replication, as it states only what was the purpose of the party: a man's intent cannot be put in issue. 1 *Ld. Raym.* 261. (*c*). *Booth's* case (*d*).

Bosanquet Serjt., contrà. Though this deed is inartificially drawn, yet looking to the whole of it, the Court will put that construction upon it which will best effectuate the intention of the parties. This, though a release

(*a*) 2 *Leon.* 132.
(*b*) *Hob.* 170.
(*c*) *Per Curiam*, in *Rex* v. *Griepe.*
(*d*) 5 *Rep.* 77. 3d *Resol.*

in

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in form, is, in substance a covenant not to sue. There is no reason therefore to impeach any of the authorities cited on the other side. If a conveyance of an estate be made, which must be a conveyance or nothing, and there is an exception which defeats the estate, the exception is void. But if, the deed can operate two ways, one consistently with the exception, the other not, the Court will be even astute to make the deed operate in conformity with the exception. This is the language of Lord *Hobart* (a). So, *Crossing* v. *Scudamore* (b), *Doe dem. Wilkinson* v. *Tranmer* (c), *Bac. Abr.* tit. *Release*, A. 2. 1 *Show.* 154, 5. *Payler* v. *Homersham* (d), *Goodtitle dem. Edwards* v. *Bayley* (e), *Shepherd's Touchstone*, 82., are all authorities to shew that deeds will, where it is possible, be so construed as to effectuate the intention of the parties. The present suit is quite consistent with the provisoes, for *Ellerman* is sued jointly with *Forbes* on a joint debt: *Ellerman* is only joined for conformity, and if he or his property be taken in execution, he has his remedy by an action for damages on this deed, taking it as a covenant not to sue.

This is no departure; *Ellerman* being joined only for conformity, as appears by the very deed set out in the replication, the object of the replication is in substance the same as that of the declaration.

As to the third point; there are cases in which the intention must be put in issue; as in an action against a party discharged under an insolvent act; if he pleads his discharge, the Plaintiffs must reply an intention to proceed against the effects, and not the person.

Blosset, in reply. There is no analogy between the insolvent debtor's case and the present. The Plaintiff takes his judgment in conformity with the terms of the

(a) *Hob.* 277. *Earl of Clanrickard's* case.
(b) 1 *Vent.* 141.
(c) 2 *Wils.* 75.
(d) 4 *M. & S.* 42.
(e) *Cowper*, 597.

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debtor's discharge; but such a replication as this was never heard of. With respect to the construction of the deed, it never was meant to leave *Ellerman* to his action of covenant. (*Dallas* C. J., nor was it meant to leave the Plaintiffs without a remedy.)

The Plaintiffs have a remedy in equity, but the Defendants have none. Could it be in the contemplation of *Ellerman* that judgment and execution should go against him, and that he should be left to sue in covenant a person, who might have no effects to answer him in damages? The authorities in *Bacon*'s Abridgment go to shew, that a covenant not to sue may enure as a release; but this is very different from the position that a release may enure as a covenant not to sue, and the judgment of the Court in *Hutton* v. *Eyre* (a) turns on the former ground. The question really before the Court is beside the cases cited by the Plaintiffs. Can the parties fetter the legal operation of a release upon the very matter on which the release is to operate? The subject matter on which the deed is to operate may be narrowed or divided, but the mode of operation cannot be changed. A party who enters into a deed is presumed to do so with a full knowledge of all its effects.

As to the departure, the declaration is in the usual form, and it no where appears that *Ellerman* was joined merely for conformity, so that upon the face of the pleadings, the demand in the replication differs from that in the declaration.

Cur. adv. vult.

DALLAS C. J. now delivered the judgment of the Court. The circumstances, under which this case comes before the Court will appear by referring to the pleadings at large. The general question which arises is, whether the release as set forth constituted a bar to the

(a) 6 *Taunt.* 289. *S. C.* 1 *Marsh.* 603.

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action. Of the intention of the parties no doubt can be entertained. It was meant to release *Ellerman* as to person and effects, but not *Forbes*; and, therefore, to retain against *Ellerman* every right and remedy necessary to enforce payment from *Forbes*. But so to construe the release as to make it a release of both, which it would be if no action could be brought against *Forbes*, because *Ellerman* could not be joined, would make it operate not to effectuate but to defeat the intent of the parties. As little doubt can exist upon the words made use of to effectuate the intent, as upon the intent itself. It is not an absolute and unqualified release, but in terms conditional and provisional, being made subject to an exception; such exception forming part of the same sentence with the words of release, and immediately connecting with and attaching upon them, and introductory to and followed up by a proviso, by which it is expressly declared, that nothing contained in the deed of release shall be taken to release, or in any way prejudice or affect any demands of the Plaintiffs, either against the said *John Murray Forbes* separately, or as a partner with *Ellerman*.—Now it would be to release and in every way to affect the demand against *Forbes* as partner with *Ellerman*, to give such operation to the release as in effect to make it a release to both, by making it a bar to an action, in which, for the recovery of a joint debt, both must be jointly sued. Nor does this even rest on negative though necessary construction, for, in a subsequent part of the deed, it is expressly provided and declared to be the true intent and meaning of the release, that it shall be lawful for the Plaintiffs to commence and prosecute any action against the said *Abraham Frederick Daniel Ellerman* jointly with the said *John Murray Forbes* for the recovery of the joint debt due from them; and this is a joint action for the recovery of such debt, being, therefore, an action expressly and in direct terms authorised by the deed of release itself.

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But against this, objections of a technical and artificial nature have been raised, and we have been referred to many cases, in which it has been held, that a saving or condition repugnant to the nature of the grant is void, and that the grant remains absolute and unqualified, the condition no way operating in restraint of the grant. — It is not necessary to pursue these cases into their detail: — they are all cases of notoriety, the law of which is not to be disputed, and the only question is upon their application. But with respect to them all I would observe, that in one of the cases cited at the bar it was correctly stated, that the rule of construction in modern times has been more equitable than formerly; courts looking rather to the intention of the parties than to the strict letter; not suffering the latter to defeat the former, but in certain cases of exception to which it is not now necessary to refer. — Taking these cases, however, such as they are, the application sought to be established is altogether fallacious. — It is assumed, that, wherever the word release is made use of, it must operate absolutely and unconditionally, tho' immediately and in the same sentence followed by words, which shew it to be partial and particular only, and the general words being in no respect repugnant to the special words, but the latter a qualification merely of the former, leaving the release to operate to every purpose except to the exclusion of the particular purpose, which the parties have declared it to be their intention it shall not exclude. This being apparent, both in terms and meaning, what are the rules of law which apply, narrowing them to the particular point? I pass over the general and leading principle, that the intent of the parties shall prevail as far as by law it may; and further, that Courts will be anxious so to construe the law as to give effect to that intent, provided it do not contravene any fundamental rules of the policy of the law. If a deed can, therefore, operate two ways, one consistent with the intent and the

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the other repugnant to it, Courts will be ever astute so to construe it as to give effect to the intent; and the construction, I need not add, must be made on the entire deed. — The passage cited at the bar is to this effect material. — "I exceedingly commend the Judges (said Lord *Hobart*) that are curious and almost subtil to invent reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury which by rigid rules might be wrought out of the act" (*a*); and it has been correctly added, that in the case of *Crossing* v. *Scudamore*, Lord *Hale* cites and approves of the passage in *Hobart*, which is again referred to by *Willes* C. J. in the case in 2 *Wilson*, and is cited to be approved of and to be governed by in many other cases. Not to go thro' all the authorities which are to be found, it will be sufficient to select one or two only, and these will refer to the rest. In *Morris* v. *Wilford* (*b*), it was expressly decided "that a release shall be construed according to the particular purpose for which it was made." *Jones*, *Wyld* and *Twisden* Justices were of opinion on the first argument, that the release is no bar notwithstanding the general words, for being made for particular purposes the general words are to be guided by the particular purposes. *Rainsford* C. J. contrà. The case was argued a third time, when by the whole Court judgment was given for the Plaintiff. — In *Payler and Others* v. *Homersham* (*c*), Lord *Ellenborough* adopts the position, that the general words of a release may be restrained by the particular recital. "Common sense (said his Lordship) requires that it should be so, and in order to construe any instrument truly you must have regard to all parts, and especially to the particular words of it." The case in

(*a*) *Hob.* 277. Earl of *Clanrickard's* case.
(*b*) 2 *Show.* 47.
(*c*) 4 *M. & S.* 423.

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Rolle to this effect, tho' said to have been denied by Lord *Holt* to be law, "seems to me (said Lord *Ellenborough*) as sound a case as can be stated."—And Mr. Justice *Bayley* adds "there is no doubt but a particular recital in a deed will restrain the general words."

On all these grounds, therefore, the apparent intent of the parties, sufficient words to effectuate that intent, the special nature of the release as formed by the very language in which the release itself is created, the matter, upon which it is to operate, and the known and established rules of construction to be collected from the authorities referred to, we are of opinion that this demurrer ought to be overruled. And in conclusion I will only say, that it is not intended to interfere with any received principles or established cases, but to decide only on this particular case with reference to its special nature, calling in aid former authorities only in the manner in which it has been endeavoured to apply them. — But, for further caution, I will add, the decision of the Court only is, that the demurrer be over-ruled. It is not necessary now to say any thing as to any ulterior remedy the Defendant may have or suppose himself to have: — In this respect he will act as he may be advised, and as circumstances may seem to require.

Demurrer overruled accordingly.

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May 15.

The Court refused to set aside as irregular a bill filed against the warden of the *Fleet*, on the day after the essoin day of *Easter* term, entitled as of *Easter* term, and accompanied with a notice to plead in four days, the Plaintiff not having signed judgment within eleven days after the filing of the bill.

A BILL was filed against the Defendant, warden of the *Fleet*, on the 17th of *April*, the day after the essoign day of this term. The bill was entitled as of this term, four days' notice was given to plead, but judgment was not signed within eleven days afer filing the bill.

Blosset Serjt. had obtained a rule *nisi* to set aside all the proceedings, with costs, for irregularity. By the old practice a bill could not be filed against the warden in vacation, *Crook* v. *Eyles* (*a*), *Stock and Others* v. *Eyles* (*b*); because it was his privilege to be called and answer in Court, which he could only do in term time; and when a declaration was filed against him in term, he was allowed eleven days to plead, under 8 & 9 *W.* 3. *c.* 27. *s.* 12. By the 59 *G.* 3. *c.* 64., parties were enabled to file a bill against the warden in vacation, but in such a case were bound to entitle it as of the preceding term. Taking the essoign day as the first day of term, the Plaintiff was irregular, in not having given an eight day rule to plead, upon which the warden was entitled to three more days, by the 8 & 9 *W.* 3. *c.* 27. Taking the essoign day as part of the vacation, the bill was irregular, in not being entitled as of the preceding term.

Vaughan Serjt. in shewing cause, contended, that the essoign day being the first day of term, the bill was properly entitled, and that the provisions of the statute 8 & 9 *W.* 3. were sufficiently pursued, if no judgment was signed against the warden within the eleven days allowed him to plead. The merely giving him notice

(*a*) 6 *Taunt.* 347. *S. C.* 2 *Marsh.* 49. (*b*) 6 *Taunt.* 352.

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to plead in four days, (unless followed up by a judgment for want of a plea,) was wholly immaterial.

Blosset was heard in support of his rule.

Cur. adv. vult.

DALLAS C. J. now delivered the judgment of the Court. The objection to the proceedings in this case is, that the Plaintiff has filed his bill against the warden after the essoign day of this term, and before what is ordinarily called the first day of the term. It was contended, that, under the statute of 8 & 9 *W.* 3. *c.* 27. *s.* 12. a bill must be filed against the warden in term. In support of this proposition, the cases of *Crook* v. *Eyles* (*a*), and *Stock and Others* v. *Eyles* (*b*) in the same book, were cited. It was admitted, that under a late act of parliament, of the 59 *Geo.* 3. *c.* 64. a bill may be filed against the warden in the vacation. In the cases in 6 *Taunt.* this Court held, that on the construction of the statute of 8 & 9 *W.* 3., a bill could not be filed against the warden in the vacation, because it is enacted by that statute, that it shall be lawful for any person having cause of action against the warden, upon a bill filed against him in this court or in the Exchequer, and a rule being given to plead thereto to be out eight days at most, after filing such bill, to sign judgment against him, unless he plead within three days after the rule is out; and the Court holding that a rule to plead could only be given in term time, when the Court was actually sitting, decided that the actions could only be commenced in full term. This being found to be attended with inconvenience, the parliament thought it expedient, that the law and practice should be altered; and, there-

(a) 6 Taunt. 347. (b) Ibid. 352.

fore,

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fore, by the 59 *Geo.* 3. *c.* 64. intituled, "an act to facilitate proceedings against the warden of the *Fleet* in vacation," after reciting, that by the practice of the courts of Common Pleas and Exchequer, and by reason of the former act, no proceedings can be commenced in the time of the vacation against the warden, for or in respect of the escape of any prisoner or prisoners from or out of his custody, it is enacted, that persons having causes of action against the warden, for or in respect of any escape, may commence their action, by filing a bill against the warden at any time in vacation, and entitle it of the preceding term; a copy of which, within twenty-four hours after filing, is to be delivered to the warden or his deputy, and the warden is to appear and plead within the first four days of the next term, or judgment shall be signed against him.

It is now contended, that, admitting by the last act a bill may be filed against the warden in time of vacation, and by the former act in term time, yet, that a party having cause of action against the warden for an escape in the interval between the essoign day and the term, cannot, during that interval, file his bill. If that be so, then that interval must be deemed no part of the vacation, or of the term. We are of opinion that the law warrants no such conclusion. We think we are bound to put such a construction on those statutes (and particularly on the statute of the 8 & 9 *W.* 3., on which this question arises) as will tend to prevent many serious inconveniencies, which would otherwise arise, and to advance the remedy of the suitor. In contemplation of law the essoign day is the first day of the term. In the case of *Standford* v. *Cooper* (*a*) it was holden, that a judgment has relation to the essoign day of the term, for (as the Court says) it is in law the first day of the term,

(*a*) *Cro. Car.* 102.

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and all legal acts have relation thereto. This case was recognised by the Court of King's Bench in the case of *Lord Portchester* against *Petrie*, in *Hilary* term 1783. We think the interval between the essoign day and the day of the Court's actually sitting must be taken to be part of the term. But it is said, that if it be so, still the bill cannot be filed, because by the practice it is necessary that the warden should be called in court before the bill is filed. That which is mere form, and rendered impossible by the Court's not actually sitting during this interval, ought not, we think, to prevent the Plaintiff from commencing his suit, nor ought, in our judgment, the impossibility of his giving a rule to plead before the sitting of the Court to have that effect. We think that a Plaintiff may file his bill after the essoign day, and that if he gives a rule to plead on the first day of the term (that is) the first day the Court actually sits, he will substantially comply with the requisition of the statute of the 8 & 9 *W.* 3. The rule which has been obtained by the Defendant, has prevented the Plaintiff from doing this in the present case.

The rule must be discharged, and the Defendant must appear and plead in four days.

Rule discharged accordingly.

May 15.

BUCKLAND *v.* BUTTERFIELD and Another.

A conservatory erected by tenant for years (who had a remainder for life, after the death of his lessor) on a brick foundation, attached to a dwelling-house, and communicating with it by windows opening into the conservatory and a flue passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees.

ACTION on the case, in the nature of waste, by tenant for life, aged 70, against the assignees of her lessee from year to year, who had become bankrupt

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rupt. The bankrupt was the son of the Plaintiff, and had also a remainder for life in the premises after her death. At *Buckingham Lent* assizes, 1820, before *Graham* B. the case proved was, that the Defendants had taken away from the premises let to the bankrupt a conservatory and a pinery. The conservatory, which had been purchased by the bankrupt and brought from a distance, was by him erected on a brick foundation fifteen inches deep: upon that was bedded a sill, over which was frame work covered with slate; the frame work was eight or nine feet high at the end, and about two in front. This conservatory was attached to the dwelling-house by eight cantilivers let nine inches into the wall, which cantilivers supported the rafters of the conservatory. Resting on the cantilivers was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with *Portland* stone, and connected with the parlour chimney by a flue. Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library. A folding door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house, to which it had been attached, became exposed to the weather. Surveyors who were called, stated that the house was worth 50*l.* a-year less after the conservatory and pinery had been removed. The learned Judge having stated his opinion that the Plaintiff ought to recover at least for the pinery and probably for the conservatory, the jury, estimating the Plaintiff's life at six years' purchase, gave a verdict for her, 300*l.* damages.

Peake Serjt. having obtained a rule nisi for a new trial, on the ground that this conservatory, though affixed to the freehold, was a matter of ornament, not beneficial to the premises, but lawfully removeable by

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the tenant, and that at all events the damages were excessive.

Blosset Serjt. shewed cause against the rule. This conservatory was not only affixed to the freehold, but actually formed a part of the dwelling-house, doors of communication having been made out of the sitting room, so that, when the conservatory was pulled down, the adjoining part of the house was rendered uninhabitable, being entirely exposed to the inclemency of the atmosphere. In all the cases, not excepting those that relate to the removal of ornamental constructions or additions, it has been considered, among other things, whether the tenant placed them on the premises with a view to removal, or no. Here, the party, though tenant from year to year, was entitled to the reversion after the death of his mother, to whom he was tenant, and he would never have made so costly an addition to his house as tenant from year to year, unless with a view to improve his reversionary interest. The damages, if estimated according to the tables set forth for life insurances by act of parliament, are perfectly fair; the Plaintiff's life being worth six years' purchase, and the damage done having deteriorated her property to the amount of 50*l.* a-year.

Peake, in support of his rule. The conservatory was an erection merely for the purpose of ornament or pleasure; it neither formed part of the habitation nor rendered it more convenient. So far from being certainly beneficial to the property or necessary to its occupation, it might render it of less value in the eyes of a succeeding tenant, as an expensive and useless incumbrance. Whatever the law may be, with respect to parties who stand in other relations to each other, yet as between landlord and tenant, the tenant has a right to remove all ornamental erections which do not improve

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prove the property for the purposes of occupation. *Beck* v. *Rebow* (*a*), *Ex parte Quincy* (*b*), *Lawton* v. *Lawton* (*c*), and *Elwes* v. *Mawe* (*d*). In this latter case Lord *Ellenborough* considers all the decisions on the subject, and recognises the right of the tenant to remove things put up merely for ornament. In *Penton* v. *Robart* (*e*) a greenhouse erected by a market gardener, was, by Lord *Kenyon*, held to be removable. The mere fixation of a thing to the freehold cannot be the criterion by which we are to determine whether it is removeable or not; for every large picture, chimney piece, or wainscot, must be in some manner so affixed. If the wall of the house has sustained an injury by the removal of the conservatory, that indeed may be the subject of action, the damages in which should be commensurate to the injury done to the house and to the money requisite to restore it to its original state, but ought not (as in the present case) to be calculated by the supposed diminution of annual value on account of the loss of that, which the tenant had a right to remove.

Cur. adv. vult.

DALLAS C. J. now delivered the judgment of the Court. This was an action on the case, tried before *Graham* B. at the last *Aylesbury* assizes. The question in the cause, as far as relates to the motion now before us, was, whether a conservatory affixed to the house in the manner specified in the report was so affixed as to be an annexation to the freehold and to make the removal of it waste? In *Elwes* v. *Mawe* will be found at length all that can relate to this case and to all cases of a similar description. — It is not necessary to go into the distinctions there pointed out as they relate to different classes of persons, or to the subject-matter itself of the

(*a*) 1 *P. Wms.* 94.
(*b*) 1 *Atk.* 477.
(*c*) 3 *Atk.* 13.
(*d*) 3 *East*, 3.
(*e*) 2 *East*, 88.

enquiry.

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enquiry. Nothing will, here, depend on the relation in which the parties stood to each other, or the distinction between trade and agriculture; for this is merely the case of an ornamental building constructed by the party for his pleasure, and the question of annexation arises on the facts reported to us; and, I say the facts reported, because every case of this sort must depend on its special and peculiar circumstances. On the one hand it is clear, that many things of an ornamental nature may be in a degree affixed, and yet, during the term, may be removed; and, on the other hand, it is equally clear, that there may be that sort of fixing or annexation, which, though the building or thing annexed may have been merely for ornament, will yet make the removal of it waste. The general rule is, that where a lessee, having annexed a personal chattel to the freehold during his term, afterwards takes it away, it is waste. — In the progress of time this rule has been relaxed, and many exceptions have been grafted upon it. One has been in favour of matters of ornament, as ornamental chimney pieces, pier glasses, hangings, wainscot fixed only by screws, and the like. Of all these it is to be observed, that they are exceptions only, and, therefore, though to be fairly considered, not to be extended; and with respect to one subject in particular, namely, wainscots, Lord *Hardwicke* treats it as a very strong case. — Passing over all that relates to trade and agriculture as not connecting with the present subject, it will be only necessary to advert, as bearing upon it, to the doctrine of Lord *Kenyon* in 2 *East*, 88., referred to at the bar. — The case itself was that of a building for the purpose of trade, and standing, therefore, upon a different ground from the present, but it has been cited for the *dictum* of Lord *Kenyon*, which seems to treat green-houses and hot-houses erected by great gardeners and nursery-men as not to be considered as annexed to the freehold. Even if the law were so, which

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it is not necessary to examine, still, for obvious reasons, such a case would not be similar to the present: but in *Elwes* v. *Mawe*, speaking of this *dictum*, Lord *Ellenborough* says, there exists no decided case, and, I believe, no recognised opinion or practice on either side of *Westminster Hall* to warrant such an extension. — Allowing, then, that matters of ornament may or may not be removeable and that whether they are so or not must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended if such right were to be established in the present instance under the facts of the report, to which it will be sufficient to refer; and, therefore, we agree with the learned Judge, in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste.

Rule discharged.

SPRAGG *v.* HAMMOND.

May 15.

In 1814, a distress was made on a tenant for the whole of the rent due from him, and a deduction for land-tax was refused, the lease being silent as to the land-tax; the tenant having protested against his liability, paid, during five succeeding years, the land-tax, without renewing in any sort the objection of his non-liability to pay: Held, that in 1820 he could not recover, in an action for money paid to the Defendant's use, any of the sums so paid for land-tax.

THIS case, as stated by *Dallas* C. J. in delivering the judgment of the Court, was as follows:

This was an action brought to receive the sum of 48*l.* 5*s.* 1*d.*, as so much paid by the Plaintiff to the Defendant's use. — The facts of the case, shortly stated, were these — The Plaintiff held certain premises under a lease from the Defendant, the lease being silent as to the payment of the land-tax. — In 1814 the Defendant

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distrained, and at that time insisted on the payment of the rent in arrear, refusing to let the land-tax be deducted; and accordingly received his rent in full, alleging, that he had nothing to do with the tax in question. — The Plaintiff about this time, or shortly after (viz. on the 13th *December* 1814,) applied by his attorney to have the sums so paid, refunded, and protested against his future liability to pay. — The Defendant, however, still refused to deduct, professing his readiness to appear to any action that might be brought, and from this time down to 1819, the Plaintiff went on regularly paying, without deducting or claiming to deduct out of the rent, the tax in dispute, or renewing in any sort the objection of his non-liability to pay.

Under the direction of the learned Chief Justice, the Plaintiff was nonsuited at the *Middlesex* sittings after last *Hilary* term, with leave to move to enter a verdict for such sum as the Court should think he was entitled to. Accordingly

Lawes Serjt. having obtained a rule *nisi* to this effect,

Onslow Serjt. shewed cause against the rule. The nonsuit was proper on principle and on precedent. It would be bad policy to allow a party to unravel a transaction at the distance of six years. His submission, at the time his claim was made and denied, ought to be conclusive against him. A party, who pays with a full knowledge of facts, tho' in ignorance of law, cannot recover money so paid, and this principle is so well established that it is not necessary to refer to the numerous cases, in which it is laid down. A recovery by distress is a recovery by process of law, which the party cannot again contest; *Marriott* v. *Hampton.* (*a*)— *Denby* v. *Moore* (*b*), *Andrew* v. *Hancock* (*c*), and

(*a*) 7 *T. R.* 269.
(*b*) 1 *B. & A.* 123.
(*c*) 1 *Brod. & Bing.* 37. S. C. 3 *B. Moore*, 278.

Stubbs

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Stubbs v. *Parsons* (*a*), all show, that money thus paid on account of taxes, may be deducted at the time, but cannot be recovered afterwards; and this appears even from the very terms of the first land-tax act (*b*), which has been followed by all the succeeding acts, and also by the terms of the statute imposing the property-tax. (*c*)

Lawes, in support of his rule. The Plaintiff is entitled, at all events, either as money paid to the use of Defendant, or as money paid and received by Defendant to Plaintiff's use, to the sum claimed to be deducted when the distress was made in 1814. The cases referred to, are chiefly in replevin; in those cases, it was held, that the party could make no deduction after the current year, for the property might be changed, and the tenant have no right to deduct against a succeeding landlord: but it is perfectly consistent with such a restriction, that he may afterwards recover the sum in dispute, in an action for money paid, or money had and received — and this was intimated by the Court in *Stubbs* v. *Parsons*. The sum in dispute here, at least the 14*l.*, was not a voluntary payment, but made on compulsion, for a distress is as highly compulsory as any judicial proceeding: though, as being the act of the party it is not, like judicial proceedings, incapable of being afterwards questioned. The land-tax is a landlord's tax as between landlord and tenant, and must be borne by the landlord unless any agreement appears to the contrary, *Rex* v. *Mitcham* (*d*), and none appears here. *Exall* v. *Partridge* (*e*), *Astley* v. *Reynolds* (*f*) and *Hales* v. *Freeman* (*g*) are authorities to show, that, in

(*a*) 3 *B.* & *A.* 516.
(*b*) 4 *W.* & *M.* *c.* 1. *s.* 13.
(*c*) 46 *G.* 3. *c.* 65. *s.* 74. *Sched.* A. *No.* IV. 9.
(*d*) *Dougl.* 226.
(*e*) 8 *T. R.* 308.
(*f*) *Str.* 916.
(*g*) 1 *Brod.* & *Bing.* 391.

point

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point of principle, this sum, the payment of which the Plaintiff could not avoid, may be recovered by him in the action. *Graham* v. *Tate* (a) seems expressly in point. In *Denby* v. *Moore* there was no dispute at the time of the payment, and *Marriott* v. *Hampton* was an action brought after judgment in a suit, in which the cause of the second action ought to have been contested.

Onslow, in reply to the cases cited, observed that *Hales* v. *Freeman* turned on the provisions of a particular act of parliament; and in *Graham* v. *Tate* the action was brought immediately after the payment had been made, whereas, here, there was an interval of six years' acquiescence.

Cur. adv. vult.

DALLAS C. J. now delivered the judgment of the Court, and, having stated the case, proceeded as follows: On these facts, we think this case is not to be distinguished as to the general ground from the former cases, in which it has been held, that a payment made under such circumstances is not to be considered as a voluntary payment, and cannot be recovered back: — It would be superfluous to go into the different grounds on which this has been decided, considering how fully they are stated in the printed reports of the different cases, both in the Court of K. B. and in this Court. To these cases I shall, therefore, merely refer; only adding that the present is stronger in degree; for resistance to a demand, dereliction of that resistance, and subsequent and uniform acquiescence, operate more strongly than a payment made in ignorance and silence would have done. The simple point, on which we have hesitated for a moment, has been, as

(a) 1 *M. and S.* 609.

to

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to the sum claimed to be deducted, when the distress was made in 1814; and with a view to this, we wished to look into the case of *Graham* v. *Tate*, but on consideration, we think it does not apply in favour of the Plaintiff; for in *Graham* v. *Tate* the claim made was immediately followed up, and never afterwards abandoned, not falling therefore, in point of principle, within all or any of the several grounds on which, as fundamental grounds to sustain actions of this description, such cases have been decided.

The present rule must therefore be discharged, and the nonsuit stand.

Rule discharged accordingly.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term,

In the First Year of King GEORGE IV.

1820.

MEABURN TATHAM Demandant, LLOYD SALISBURY BAXENDALE Tenant, JONATHAN TABOR and Wife Vouchees.

June 6.

In a recovery, the *præcipe*, warrant of attorney, and affidavit of caption were engrossed on *parchment* and sent to certain commissioners at *Rotterdam*. The commissioners copied these instruments upon paper (in consequence of the refusal of the *Dutch* notary to certify upon *English* documents, which the *Dutch* law would not allow him to do), and returned them written upon *paper* stamped with a *Dutch* stamp and certified by the *Dutch* notary. On a motion that the appearance of the tenant might be recorded, the warranty of the vouchees entered, and all other usual proceedings had, notwithstanding these documents were upon *paper*, the Court unanimously rejected the application.

IN *Easter* term last, a writ of *dedimus potestatem* was directed to certain commissioners residing at *Rotterdam* for the purpose of taking the acknowledgment of *Jonathan Tabor* and *Helen*, his wife, residing at the same place, to a warrant of attorney for suffering a common recovery of lands in the county of *Middlesex*. The

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usual copy of the *præcipe* and warrant of attorney was made out upon parchment, and also an affidavit, to be sworn by one of the commissioners, on parchment according to the rule of Court made in *Hilary* term 14 *G.* 3. With these documents, special instructions were, also, forwarded directing the mode in which the caption of the warrant of attorney was to be certified, and the several documents were to be executed, which documents the commissioners were directed to use for that purpose. The commissioners complied with all the instructions excepting that they re-copied the *præcipe* and warrant, and also the affidavit upon paper in consequence of the *Dutch* notary refusing to certify on the *English* documents, on the ground that all documents bearing his certificate, must, according to the laws of *Holland*, bear the *Dutch* stamp, and that he could not, consistently with his duty, certify upon the documents so sent out. The documents so written upon paper were accordingly stamped with a *Dutch* stamp, and certified by the notary.

Hullock Serjt. now prayed that the appearance of the tenant named in the writ of entry might be recorded as of this present *Trinity* term, that the warranty of the vouchees might be also duly entered, and all other usual proceedings be had and taken thereon, notwithstanding the acknowledgment, and also the affidavit of the due caption of the warrant of attorney were written upon paper instead of parchment. He urged, that, though the practice was for the *præcipe* and warrant of attorney to be engrossed on parchment, yet no rule of Court absolutely required this; and the rule of Court which required the affidavit to be so engrossed, could never have been intended to operate in exclusion of parties altogether, a hardship which would arise in the present case; for the laws of the place where the parties resided abso-

absolutely prevented them from complying with the rule of this Court. 1820.

TATHAM Demandant.

But *The Court*, after conferring with the officer, thought that they could not relax the rule and practice of the Court, and rejected the application, recommending further endeavours to get the proceedings written on parchment and returned during the term, and suggesting, that the return to the *dedimus* might be enlarged and the writ rescaled. (*a*)

Hullock took nothing by his motion.

(*a*) And see 1 *Brod.* & *Bing.* 472.

COLYER *v.* SPEER, Esq.

June 6.

1. The trustees of an outstanding satisfied term assigned in trust to attend the inheritance, may sue the sheriff for not retaining, after notice to do so, in an execution against the tenant, a year's rent due to the landlord.

2. A notice to the sheriff in such case, stating that the rent was due to *J. W.* and the mortgagees of his estate, and signed by a person who was not the receiver appointed by the mortgage deed, was held sufficient.

3. The sheriff is liable, in such case, if he remove any of the tenant's goods without retaining the year's rent.

CASE against the Defendant, as sheriff of *Surry* for removing, under an execution, the goods of *Pannell*, the occupier of certain lands, without satisfying a year's rent due from *Pannell* to his landlord, due notice having been given to the sheriff, after the taking and before the removal of the goods, that such rent was due. — At the trial before *Dallas* C. J. *Middlesex* sittings after *Easter* term last, the Plaintiff's title appeared to be as follows; *Woodroffe*, the original owner of the lands before mentioned, had in 1812 charged them with an annuity of 468*l.*, and in 1813 with an annuity of 92*l.* These two annuities were secured to the purchasers of them by two terms, each of 99 years, granted to the Plaintiff in trust for such purchasers. In 1816 *Woodroffe* borrowed 10,000*l.* on mortgage, paid off the two annuitants, and conveyed the lands in fee to the mortgagees: By the mortgage deed

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it was, among other things, declared, that the Plaintiff should stand possessed of the two terms before mentioned (then outstanding and satisfied) in trust for the mortgagees, and to attend the inheritance; and that, until default made in payment of the 10,000*l.* and interest, *Woodroffe*, the mortgagor, might quietly enjoy the lands; and *James Seton* was appointed receiver for the mortgagees. *Pannell*, the occupier, held the lands under an agreement for a lease from *Woodroffe*, bearing date the 29th of *September*. The notice served on the sheriff was as follows. " *Copeland* v. *Pannell*. Sir, I do hereby give you notice that there is due to *William Woodroffe* Esq., and the mortgagees of his estates in the parish of *Worplesdon*, in the county of *Surry*, from *John Pannell*, the Defendant, the sum of five hundred pounds for one year's rent, at *Michaelmas* day last past, which you are to pay to me as receiver of the rents of the same estates. *R. Edwards*, 2d *November* 1819, *Castle Street*, *Holborn*. — To the sheriff of the county of *Surry*, and to Mr. *Jervis*, his officer, and all others whom it may concern."

A witness proved that the whole of the occupier's property (worth about 1100*l.*) was not taken away by the sheriff, but rather more than half. A verdict was found for the Plaintiff, under the direction of the learned Chief Justice, with leave for the Defendant to move to enter a nonsuit. Accordingly

Pell Serjt. now moved for a rule *nisi* to that effect, on the grounds

First, that the action should have been brought in the name of *Woodroffe*, and not in that of *Colyer*. — The statute of 8 *Ann c.* 14., he contended, was passed not to protect the trustee of an outstanding satisfied term, but the person who was beneficially interested as landlord of the premises.

Secondly,

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Secondly, that the notice was insufficient and ambiguous, conveying no certain information to the sheriff. If the mortgagees were the pesons accustomed to receive the rent, their names should have been specified; if *Woodroffe* had been accustomed to receive it, mention of the mortgagees should have been omitted; If the Court should hold that *Colyer* was the proper party to sue, the notice should have ordered the sheriff to pay to *Colyer*; and, at all events, it should have been given by *Seton* the receiver named in the mortgage deed, and not by *Edwards*.

Thirdly, it appeared that the sheriff had left some property on the premises, and it ought to have been shewn that this was not sufficient to satisfy the rent in arrear.

Sed per Curiam. The Plaintiff is a landlord within the terms of the statute. It never can be supposed that one, who, like the Plaintiff, has a title, on which he might recover in ejectment, is excluded from suing as landlord for a wrong committed by the sheriff in respect of the premises to which the Plaintiff is so entitled.

With regard to the notice, the sheriff is informed that rent is due, and that is sufficient to put him on his guard — To some notice he is unquestionably entitled, but as the statute has not specified any particular form, there can be no dispute about the terms.

As to the third point, the sheriff infringes the statute, if, after notice of rent in arrear, he remove any of the goods without retaining that rent — The words of the statute (*a*) are "no goods or chattels whatsoever lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever,

(*a*) 8 *Ann.* c. 14. s. 1.

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unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent, &c. And the sheriff or other officer is thereby empowered and required to levy and pay to the Plaintiff as well the money so paid for rent as the execution money." It is clear that the sheriff must first levy for the rent and then for the execution. — It would be a great hardship on the landlord to oblige him to watch the sheriff's officer for the purpose of seeing when the execution is finished, and whether or no sufficient distress is left behind. The statute requires no such thing.

Rule refused.

June 10.

WILLIAM BROOKE, Esq. *v.* SAMUEL ENDERBY and WILLIAM GILPIN.

The Plaintiff carried on dealings in one general and unbroken account with *A.*, one of the Defendants, as his banker and army agent, from a period before 1807 up to 1819, when *A.* became bankrupt, and a balance was struck, none having been before struck since 1816. In 1807 Defendant *B.* became a partner with *A.*, and continued so till 1817, but the partnership was secret, and unknown to Plaintiff till *A.*'s bankruptcy, Defendant *B.* never interfering (to the knowledge of Plaintiff) in the business carried on by *A.*; at the expiration of the partnership in 1817 a balance was due from Defendants to Plaintiff; between the expiration of the partnership and *A.*'s bankruptcy, *A.* paid to Plaintiff, and also received from Plaintiff, several sums. In an action against the Defendants for the balance due from them at the expiration of the partnership, (*A.* having pleaded his bankruptcy and certificate,) Held, That *B.* might consider the sums paid by *A.* to Plaintiff after the expiration of the partnership, as paid in reduction of the balance due at the expiration of the partnership, and might take credit for them without giving credit for any sums received after the expiration of the partnership by *A.* on account of Plaintiff.

THIS was an action of *assumpsit* for money lent, money paid, money had and received, and on an account stated. The Defendant *Enderby* pleaded the general issue, and the Defendant *Gilpin* his certificate, under a commission of bankrupt, which was admitted by the Plaintiff. The cause came on for trial at the *London*

sittings

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sittings before *Easter* term, when the jury found a verdict for the Plaintiff for 333*l.* 17*s.* 5*d.* subject to the opinion of the Court on the following case. The Defendant *Enderby* became a partner with the Defendant *Gilpin* in the several businesses of woollen draper, army clothier, and army agent, by indenture dated the 24th *September*, 1807 for the term of 10 years. Previous to the year 1807, the Plaintiff, being a lieutenant colonel in his Majesty's service, employed the Defendant *Gilpin* as his agent, and continued to employ him as such until the bankruptcy of *Gilpin* on the 1st of *April* 1819; during which time the Plaintiff kept a running account with *Gilpin*; *Gilpin*, from time to time, receiving the pay and allowances, and also dividends due to the plaintiff on stock and other monies on his account, and from time to time making payments to him or his order: the Plaintiff being in the habit of drawing upon *Gilpin* as his banker (*a*), who from time to time furnished copies of the account to the Plaintiff. *Gilpin* carried on business in his own name only, and *Enderby* never interfered with the business to the knowledge of the Plaintiff, nor was he known or suspected by the Plaintiff to be or have been a partner therein until after the bankruptcy of *Gilpin* on the 1st of *April*, 1819. The Plaintiff and *Gilpin* continued to deal together after the 24th *September* 1817 (*b*) down to the period of *Gilpin*'s bankruptcy, in the same way, in which they had before dealt; and the account between them continued to be kept in the same way, no distinction being made as to the time before and after the 24th *September*, 1817; but the receipts and payments prior and subsequent to that period formed part of one general account. No rest was made or balance struck in the account after the 1st *July*, 1816,

(*a*) The dealings and transactions here alluded to appeared by an account kept by *Gilpin*, a copy of which accompanied the case, and was considered as part of it.

(*b*) On which day the partnership expired by the effluxion of time.

 down

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down to the bankruptcy of *Gilpin*; and, during the existence of such account and dealings, there was, at all times, a considerable balance due to the plaintiff. No notice of the dissolution or expiration of the partnership between *Gilpin* and *Enderby* was given. The sum of 1773*l.* 9*s.* 4*d.* was paid into court by *Enderby*, and, in calculating the sum to be so paid into court, *Enderby* sought credit for all sums paid by *Gilpin* to the Plaintiff after the 24th *September*, 1817, without giving credit for any sums received after that day by *Gilpin* on account of the Plaintiff; which sums consisting of dividends on stock, &c. so received by *Gilpin*, on account of the plaintiff after the 24th *September*, 1817, amounted to 306*l.* 10*s.* 5*d.* The verdict was taken for the amount of such sums of money and interest calculated up to the 20th *April*, 1820. If the principle on which *Enderby* had calculated the sum paid into court were correct, it was admitted, on the part of the Plaintiff, that the sum of 1773*l.* 9*s.* 4*d.* paid into court by *Enderby*, covered and satisfied the whole of the Plaintiff's demand upon him with interest thereon.

The question for the opinion of the Court on this special case was, whether the Plaintiff was entitled to recover the sum of 333*l.* 17*s.* 5*d.* or any part thereof. If the Court were of opinion in the affirmative, then the verdict was to stand or be reduced as the Court should direct: otherwise a nonsuit was to be entered.

For the Defendant, *Enderby*, it was contended at the trial, that the account between the Plaintiff and *Gilpin* being one entire account, the payments made by *Gilpin* after the expiration of his partnership, not having been at the time appropriated to any particular debt by the Plaintiff, must, especially as *Gilpin* acted as banker to the Plaintiff, go in reduction of the old balance subsisting against *Gilpin* at the expiration of the partnership in 1817; while the expiration of the partnership precluded *Enderby* from being accountable for any receipts

by

by *Gilpin* subsequent to such expiration, and *Clayton's* case (*a*) was relied on.

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Hullock Serjt. now endeavoured to distinguish *Clayton's* case from the present, arguing, that, in *Clayton's* case, the dealings were carried on by *Clayton* with the bank, after the death of one of the banking partners, with the knowledge of that circumstance; whereas, here, the Plaintiff never knew that *Enderby* was a partner with *Gilpin*. He also contended that if the debtor did not, at the time of payment, appropriate the sum paid to any particular debt, the creditor might do so whenever an event occurred which raised a different order of things between them: he cited *Newmarch* v. *Clay*. (*b*)

But the Court thought the case not distinguishable in principle from *Clayton's* case, and gave

Judgment that a nonsuit be entered.

Bosanquet Serjt. was to have argued for the Defendant *Enderby*.

(*a*) 1 *Merivale*, 572. See also *Bodenham* v. *Purchas*, 2 *B. & A.* 45. and *Evans* v. *Drummond*, 4 *Esp.* 289.

(*b*) 14 *East*, 239.

BROWN *v.* HOWARD.

June 12.

Plaintiff employed Defendant in 1808 to lay out money for him in the purchase of an annuity, and discovered in *February* 1814, that the security provided by the Defendant was void within the Defendant's own knowledge at the time of the purchase. In *January* 1820 Plaintiff sued Defendant in assumpsit for breach of an implied contract to provide good security: Held, that, the action proceeding on the contract and not on the fraud, the statute of limitations was a good bar.

THE Plaintiff declared against the Defendant in *assumpsit* on an implied promise to lay out certain monies of the Plaintiff in the purchase of an annuity

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on good, valid and sufficient security in consideration of certain reasonable reward to be therefore paid to the Defendant by the Plaintiff. Breach; that the Defendant did not lay the Plaintiff's money out on good, valid or sufficient security, but on bad, invalid, insufficient, fraudulent, and fictitious security, to wit, a pretended security of certain copyhold premises whereof one *W. Alston* pretended to be seised, whereas in truth *W. A.* was not seised thereof; of all which premises the Defendant had notice. The Defendant pleaded the general issue and the statute of limitations. At the trial before *Dallas* C. J. *Middlesex* sittings after *Hilary* term last, it appeared, that the annuity was granted in 1808 and paid till *February* 1814, when, *Alston* becoming insolvent, it was shortly afterwards, and within six years of the commencement of the action (in *January* 1820), discovered that he had no title to the premises in question. The jury found that the Defendant knew that *Alston* never had any title to the premises, and gave a verdict for the Plaintiff; the learned Chief Justice allowing the Defendant to move to enter a nonsuit on two objections to the verdict; one of which was, that the statute of limitations operated as a complete bar to the Plaintiff's recovery. Accordingly

Vaughan Serjt. having obtained a rule *nisi* to set aside the verdict and enter a nonsuit,

Lens and *Pell* Serjts. shewed cause against the rule, and, with respect to the statute of limitations, contended, that after the declaration had stated this to be a fraudulent security, and the jury had found that the Defendant was acquainted with all the circumstances, it was neither more nor less than a case of gross fraud — that it had been repeatedly held that the statute of limitations did not apply in cases of fraud, *South Sea Company* v. *Wymond-*

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Wymondsell (a); and that, at all events, the action, here, had been brought within six years after the fraud had been discovered. If this had been a sale of timber which the vendor knew to be unsound at the time, but which the purchaser might not have been able to discover was the case, till six or seven years afterwards, he would be deprived of all remedy unless he could bring his action within six years after the discovery. The present case was the same in effect: And this distinguished it from all the decided cases. In those cases the fraud was discovered at the time or shortly afterwards, as in *Battley* v. *Faulkner* (b). Here, the Plaintiff could not sue so long as his annuity was paid; when it ceased to be paid, and the fraud was discovered, nearly six years had elapsed.

DALLAS C. J. If this action had been brought expressly to recover damages for a fraud the case might have been different: but here, though fraud is alleged in the breach, the gist of the action is not fraud, but a contract or promise declared on in *assumpsit*; and the promise as stated in the declaration, namely, a promise to obtain good and sufficient security for the Plaintiff's money, does not seem to amount to a warranty. The Plaintiff will not be without remedy because he will only be nonsuited here, and may if he deems it to his advantage bring another action, the ground of which may be fraud; though on the propriety of such a step we give no opinion: but in *Bree* v. *Holbech* (c) it is laid down that in cases of fraud the limitation only runs from the time when the fraud is discovered.

PARK J. I am of the same opinion, although this is a case of such hardship on the Plaintiff, that the

(a) 3 *P. Wms.* 143.
(b) 3 *B.* & *A.* 288.
(c) *Dougl.* 632.

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Court would, if it were possible, get out of the course of the decisions. But they cannot set aside the express words of the statute, or the decisions which seem exactly in point. What are the words of the statute? "All actions of account and upon the case —— shall be commenced and sued —— within six years next after the cause of such action or suit, and not after —— (a)" In *Battley* v. *Faulkner* the point was well put by one of the Judges "the only question is, when the cause of action accrued; for the statute then attached. I think that the cause of action accrued the moment the defendant failed to perform that which he agreed to do." But the strong case is *Short* v. *M'Carthy* (b), lately decided in the King's Bench. That case is the same as the case before the Court, if *copyhold* be read for *stock*.

Burrough J. This declaration does not meet the Plaintiff's case.

Richardson J. The statute of limitations is a bar here, because the gist of the action is a promise. — The two cases of *Battley* v. *Faulkner* and *Short* v. *M'Carthy* are conclusive on the point.

Rule absolute for a nonsuit.

Vaughan Serjt. was to have argued in support of the rule.

(a) 21 *Jac.* 1. *c.* 16. *s.* 3. (b) 3 *B.* & *A.* 626.

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TOMLINSON and WHITE *v.* SHYNN.

June 12.

Where a sheriff by mistake returned to a *fieri facias* that he had a sum in his hands to be paid to the Plaintiffs, when in truth he had not, the sum in question having been paid (through want of caution in the sheriff's officer,) to the solicitor of a commission of bankrupt issued against the Defendant, under which commission one of the Plaintiffs was an assignee: Held, that this Plaintiff knowing of such payment and having omitted to make an early objection to it, the sheriff was absolved from paying to the Plaintiffs the sum mentioned in his return.

THE Plaintiffs had issued execution against the Defendant for 171*l.* The sheriff's officer, *Slade*, found one *Cohen* in possession of Defendant's goods under a regular assignment as security for 150*l.* due to him from Defendant. — *Cohen* desired the sheriff's officer to sell the goods, which were accordingly sold, and *Cohen* received the proceeds, promising, after deducting the 150*l.* due to himself, to pay the remainder to *Slade* on behalf of the Plaintiffs. When the amount of the goods was ascertained, the sheriff, on the faith of this promise, returned that he had in his hands 53*l.* 6*s.* 6*d.* ready to be paid to the Plaintiffs. In the mean time *Shynn* became bankrupt, and *White*, one of the Plaintiffs, was chosen an assignee. — *Cohen*, after deducting his own 150*l.* from the proceeds of the sale, paid 53*l.* 6*s.* 6*d.*, the remainder of those proceeds, not to *Slade* as he had promised, but to *Day* the solicitor to the assignees under *Shynn*'s commission. — This payment to *Day*, if not known to the Plaintiffs at the time, was known and not objected to, (as it was sworn) long before they made the application to the Court hereafter mentioned. — Notwithstanding which

Lawes Serjt., in *Michaelmas* term last, obtained a rule *nisi* for the sheriff to pay over to the Plaintiffs, their attorney or agent, 53*l.* 6*s.* 6*d.* the sum returned by him on the *fieri facias* to be in his hands. The motion stood over on various grounds from that term till this day, when

Pell Serjt., on behalf of the sheriff, insisted that, by not objecting as soon as he knew of it, the Plaintiff *White* had assented to this payment made by *Cohen* to *Day* on behalf of the assignees, of whom *White* was himself one,

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one, that this assent or acquiescence amounted to a ratification of the payment, equivalent to a previous order; and, that, by such ratification, the sheriff was absolved from paying over money which it was clear he had never received, and which was only by a mistake returned as being in his hands, though he certainly would be bound by such return were it not for this ratification on the part of *White*.

Lawes, in support of his rule, contended that the knowledge of the Plaintiff *White*, and the omission to object to what had been done, did not amount to a subsequent assent.

Sed per Curiam. There is a subsequent assent sufficient to ratify this payment. We think, under the circumstances of the case, the sheriff is not bound to pay over the money.

Rule discharged with costs.

June 16.

BUTTS, MOUNTFORD, and BURTON, Assignees of FOSSETT, COOPER, and HOWARD, Bankrupts, *v.* SWANN, CHAPPELL, and HEYWOOD.

The following letter from *F.* and Co. to their correspondents *S.* and Co.: "Gentlemen, we request you will pay to Messrs. *H. C.* and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your hands, 600*l.*, and charge the same to our account," was held an order for the payment of money under 55 *G.* 3. *c.* 184., and liable to be stamped as such, and not with an agreement stamp, although the letter formed part of a correspondence between the three houses, being followed by a letter to *H. C.* and Son from *S.* and Co., promising to pay as directed, *provided they should be in funds for the purpose*, and by other letters between the houses of *F.* and Co. and *S.* and Co. relating to and confirmatory of the same order.

TROVER for gunpowder: the Defendants pleaded the general issue.

The cause was tried at the *London* sittings after *Hilary* term last before *Dallas* C. J., when the jury found a verdict for the Plaintiffs for 321*l.* subject to the

opinion

opinion of the Court on a case which, among other things, stated the following facts: The Defendants were commission merchants in *Liverpool*, and had been intrusted with gunpowder by the Bankrupts, before their bankruptcy, to be sold on their account. The present action was brought to recover the value of 84 barrels of gunpowder belonging to the bankrupts, which were in the hands of the Defendants on the 8th *July*, 1817, when the commission issued against *Fossett*, *Cooper*, and *Howard*. 1820. BUTTS *v.* SWANN.

The Defendants gave in evidence the two following instruments, each stamped with a 1*l.* stamp, subscribed respectively by the bankrupt, *Mark Fossett*, for the firm of *Mark Fossett* and Co., and by the Defendants; and delivered to the parties to whom they were addressed, according to the course of post from their respective dates. Neither of these instruments had any stamp at the time of being written; but, before the trial, each was stamped with an agreement stamp of 1*l.* on payment of a penalty.]

London, 29th *August*, 1816.

Messrs. *Swan* and *Heywood*,

Gentlemen,

We request you will pay to Messrs. *Henry Cooper* and Son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your charge, 600*l.*, and charge the same to our account.

We remain, gentlemen,

Your most obedient servants,

Mark Fossett and Co.

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Liverpool, 2d *October*, 1816.

Messrs. *Henry Cooper* and Son,

Gentlemen,

We have received Messrs. *Mark Fossett* and Co.'s letter of the 29th of *August* last, directing us to pay to you or your order 600*l.* out of the first proceeds of their stock of gunpowder now in our charge; and we have also their letter of the same date directing us to pay to Mr. *Augustus Hughes*, or his order, 200*l.* out of the proceeds of the said stock.—These sums we can have no objection to pay as directed, provided we shall be in funds for the purpose, subject however, in the first place, to the payment of our advances, interest, and commission on the said consignment.

We are, gentlemen,
Your obedient servants,
(Signed) *Swan* and *Heywood*.

It was objected, on the part of the Plaintiffs, that these instruments could not be read in evidence, as there was no stamp upon them at the time they were written, and the stamp afterwards affixed was not the proper stamp. The Chief Justice allowed them to be read in evidence, saving to the Plaintiffs the point whether they ought to have been admitted. The following letters, none of which were stamped, were also read in evidence on the part of the Defendants:

London, 27th *September*, 1816.

Messrs. *Swan* and *Heywood*,

Gentlemen,

Messrs. *Henry Cooper* and Son are surprised that you have not noticed the letter written by us to you in their favour, dated 29th *August* last, and which

Mr.

Mr. *Heywood*, when in town, promised should be done, but wished it to be passed through the house. You have also one of the same nature for Mr. *A. Hughes*. — We beg your attention to our request that you will forward them by return of post to those gentlemen, and at the same time we shall be obliged by receiving our account current with you.

We are, gentlemen,
Your most obedient servants,
Mark Fossett and Co.

Liverpool, 16th *December*, 1816.

Messrs. *Mark Fossett* and Co.

We request you will have the goodness to inform us whether we are to consider the undertaking given by us to *Henry Cooper* and Son and Mr. *Hughes* still in force, which binds us to apply the whole proceeds of the stock in our hands, in the first instance to pay them, or whether our acting contrary to this arrangement will not be improper? Our only motive for this precaution is to keep clear of blame from all parties.

We are, &c.
Swan and *Heywood*.

London, 23d *April*, 1817.

Messrs. *Swan* and *Heywood*,

Gentlemen,

Confirming our letters of 29th *August* last, requesting you to pay out of the proceeds of our stock of gunpowder to Messrs. *H. Cooper* and Son 600*l*., and to Mr. *Augustus Hughes* 200*l*., we have now to request that you will pay the balance, when realized, to Mr. *Joseph Searle* of *Fetter Lane*, *London*, and place the same to our account.

We are, gentlemen,
Your most obedient servants,
Mark Fossett and Co.

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Liverpool, 22d *May*, 1817.

Mark Fossett, Esq.

Dear Sir,

We have now the pleasure to inclose our account current to 31st *December* last, balance to your credit 76*l.* 1*s.* 7*d.*, which sum, upon your confirming the account, we will immediately remit to Messrs. *Henry Cooper* and Son, agreeably to your letter of 29th *August*, 1816.

The sales of gunpowder made by *Swan*, *Chappell*, and *Heywood*, up to the present time, amount to 140*l.* 17*s.* 9*d.*; but no part of this sum is yet due from the purchasers: when received, it shall be remitted in the same manner to the parties whom you have instructed us to pay over these proceeds to.

We remain,
Dear Sir,
Your obedient Servants,
Swan and *Heywood*.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover the sum of 321*l.* or any part thereof; and a verdict or nonsuit was to be entered accordingly.

Vaughan Serjt., for the Plaintiffs, among various other objections, contended that the first of the before-mentioned letters was an order to pay money within the 55 *Geo.* 3. (*a*), and as such ought to have borne a stamp at the time it was written; and there being no stamp at that time, a stamp could not be applied afterwards under sect. 10., which comprehended only cases where an im-

(*a*) c. 184. *sched. part* 1.

proper

proper stamp had been applied in the first instance. He cited *Firbank* v. *Bell* (a).

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Hullock Serjt., contrà. This letter does not constitute a bill of exchange or a strict order for the payment of money. It is not a bill of exchange, because the fund out of which the payment was to be made was uncertain; — it is not an order for the payment of money, because *Cooper* and Son could make no demand by virtue of it till *Swan* and Co. had given their assent, and that assent they only gave provisionally. In fact, it forms no more than part of the materials of an agreement, to have recovered on which the party must have declared specially on both the stamped letters. — But if it should be held to be an order for payment of money within the statute, the intent and meaning of the statute in classing instruments of this description among bills of exchange, was not to make that a bill of exchange which never can be such, but only to answer the purposes of revenue; and those purposes being answered by the application of the agreement stamp, the intent and meaning of the statute has been sufficiently pursued. — In this view, the intent of the statute is consistent with the law respecting bills of exchange: in any other view, the statute must be held inconsistent with law, by making an order to pay out of uncertain funds constitute a bill of exchange. — The enactment, therefore, of the 31 *Geo.* 3. *c.* 35., by which parties are prohibited from stamping bills after making them, cannot apply to such instruments as these, under which money is to be paid out of a particular fund.

In *Firbank* v. *Bell* there was but one document which contained the order. The letters in the present case are only two of several, constituting an entire correspondence; and by 55 *Geo.* 3. *c.* 184. sched. part 1. when any set of letters constitute an agreement, it shall

(a) 1 *B. & A.* 36.

be

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be sufficient to stamp one of them. By those means the purposes of the revenue are satisfied in cases like the present; but, if the first letter be deemed an order for payment of money within the statute, the consequences must be most extensive, for there is scarcely a mercantile correspondence out of which many such orders might not be extracted.

Vaughan, in reply, urged, that if it were sufficient to stamp, at any period subsequent to the making, an order falling so directly within the terms of the statute as the present, the purposes of the revenue would be entirely defeated, for no stamp would be had except in litigated cases.

DALLAS C. J. This case is now narrowed to a single point; it is unnecessary, therefore, to discuss the others which have been raised; for the important point now to be considered, is, whether this instrument falls within the different provisions of the acts referred to. It is agreed that, if this instrument constitutes a bill of exchange, it could not be stamped after it was first issued: if, therefore, this be an order for the payment of money, and if an order for the payment of money stand upon the same footing as a bill of exchange by the provisions of the *55 G. 3. c.* 184., the argument against its admission in evidence would be conclusive.

Does it, then, stand on the same footing as a bill of exchange by virtue of that act? Now the stamp is imposed on bills, drafts, or orders for the payment of money, the act classing them together: then, in a subsequent part of the schedule, bills, drafts, and orders for the payment of money at a future day, are made liable to the duties imposed by the act; and all bills, drafts, or orders for the payment of any sum of money out of any particular fund, which may or may not be available,

or

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or upon any condition or contingency which may or may not be performed or happen, are, by that act, to be deemed bills, drafts, or orders for the payment of money within the schedule of the act.

By the 8th section, all the provisions of the former acts are made to apply to the subject-matter of the latter.

An order for the payment of money seems to me, therefore, as far as the purposes of this act are concerned, to be placed on the same footing with bills of exchange and promissory notes; and, if it be so placed, no distinction can be drawn, after the express provision in the 55 *G.* 3., between orders for the payment of money out of a particular fund and bills and notes in general. Without saying, therefore, that the statute alters the nature of instruments, or makes that a bill of exchange which would not otherwise be such, it is clear, that, under the 55 *G.* 3., orders of this description fall within the same provisions as bills of exchange and promissory notes. And this seems to me to be decided by the case of *Firbank* v. *Bell*; a case essentially the same as that before the Court. In that case the order was to pay over to certain persons a sum of money, when a cargo of mahogany was sold, in such bills as might be received from the sale; —— an order which is directed in terms almost precisely the same as the present. — The sale might or might not have taken place, bills might or might not have been received; and the case now under consideration is, if possible, the stronger of the two. Such was the order; then followed the letter from the party in whose favour the order was made, requesting the attention of the parties, who were to effect the sale, to the before-mentioned order; and then came the answer to that letter from the parties who were to effect the sale, stating their readiness to attend to the order after they had paid themselves a sum which they had been previously in advance. — This, therefore, like the

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case under consideration, does not consist simply of an order to pay money out of a future fund which might or might not be sufficient, but contains also a subsequent correspondence. The cases, therefore, do not differ, except in the point ingeniously attempted to be distinguished at the bar. In the judgment of the Court in *Firbank* v. *Bell* it is said "There is nothing to which the name of an agreement can be given if you do not pray in aid the order; that is the only thing by which the bankrupt is personally implicated, for he is not a party to the letters;" and it is, therefore, said that there was in that case but one document which contained the order. Whether or not that distinguishes the case from the case now before the Court I shall presently examine. Lord *Ellenborough* then proceeds; "the order alone affects the bankrupt, and that amounts to nothing more than an order for payment. It falls then within the description of the act of parliament, viz. an order for the payment of money out of a fund which may or may not be available. It was the object of the legislature in framing this provision to treat as promissory notes and bills of exchange, and to subject to a stamp duty such instruments as being payable on a contingency or out of a particular fund could not in strictness fall under that denomination." Adverting, therefore, to the distinction which exists, independently of the statute, between bills and notes payable at all events, and orders payable out of a particular fund, the learned Chief Justice says, that the object of the statute was to put those instruments, which before differed from the former class, on the same footing with them. — I see no difficulty, therefore, in this case on principle, and on authority it falls within the decision before mentioned, unless the instrument is to be considered as an agreement, and not as an order for payment of money. The argument for that position appears to me to be a fal-

lacy.

lacy. The order is complete when it issues; and does not depend upon any subsequent assent to make it a valid order. According to the doctrine contended for, no order can be considered absolute if followed by a subsequent correspondence. — But a similar order, though succeeded by a correspondence, has, in *Firbank* v. *Bell*, been considered an absolute order: I think that this is such, and that it ought to have received a stamp in conformity with the provisions of the statute 55 *G*. 3.

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PARK J. The only question now to be determined in this case is, whether these papers were properly stamped. It is admitted at the bar that they fall within the provision of the act, unless they can be distinguished from the subject-matter on which the act was intended to operate. I think that this is not a bill of exchange, and have no wish to disturb the old authorities, which say that an order to pay out of a contingent fund is not a bill of exchange. This brings us to consider whether it was the object of the statute 55 *G*. 3. *c*. 184. to subject instruments like the present to the same provisions as bills of exchange and promissory notes; and that such was the object of that act seems to me clear, from the words "All bills, drafts, or orders for the payment of any sum of money out of any particular fund which may or may not be available, or upon any contingency which may or may not be performed," &c. Such instruments were not taxable before; but by the last mentioned statute they are put on the same footing as bills of exchange and promissory notes; and in this opinion I am borne out by the language of Lord *Ellenborough* in *Firbank* v. *Bell*; for that learned person seems to have had in his mind the very point raised here, viz. that the intent of the act would be pursued if this were considered an agreement. His Lordship

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says, speaking of the order for payment, "it falls, then, within the description of the act of parliament, viz. an order for the payment of money out of a fund which may or may not be available." (*a*) That case goes the whole length of the doctrine contended for by the Plaintiffs. — The order, here, is an order for the payment of money, notwithstanding the ingenious argument, that the whole correspondence forms but one agreement.

BURROUGH J. By the 37 *G.* 3. *c.* 90. a stamp duty is imposed on "any bill of exchange, draft, or order for the payment of money," and the only question is, whether this is an order for the payment of money out of a particular fund; for, such an order, by the 55 *G.* 3., that act adopting the provision of the former act, is subject to the same duties as bills of exchange and orders for the payment of money generally; that is the clear intention of the act; so that the case is the same as if the instrument were at once within the 37 *G.* 3.

RICHARDSON J. The question to be decided is, whether this instrument is properly stamped. By the statute 31 *G.* 3. (*b*) No bill of exchange, promissory note, or other note, draft, or order liable to the duties by that act imposed can be given in evidence without being lawfully stamped, nor can the commissioners stamp such instruments *after* they are made. The 48 *G.* 3. (*c*) does not in terms make the same provision; but the commissioners are authorised to do all things necessary for carrying the latter act into execution, in *like* manner as former commissioners were authorised to do all things necessary for carrying into execution the former

(*a*) 1 *B.* & *A.* 39.
(*b*) *c*, 25. *s*. 19.
(*c*) *c*. 149.

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acts. (*a*) An order like the order in the present case is not a bill of exchange or order under those acts, but is put on the same footing with such instruments by 55 *G.* 3. Though not a bill of exchange in a commercial sense, it is so within the view of the revenue acts. It has been argued, that, taking the subsequent correspondence into consideration, this letter only forms part of an agreement, and therefore is distinguishable from *Firbank* v. *Bell*, where the bankrupt only intervened once; but the first letter here is an order for the payment of money, which order is confirmed in one of the subsequent letters. — On the whole, therefore, I am of opinion that the Plaintiffs are entitled to retain their verdict.

Judgment for the plaintiffs.

(*a*) The 34 *G.* 3. *c.* 32. authorising commissioners to stamp bills, &c. after they are drawn, was only a temporary act, which has expired. See *Bayley on Bills*, 3d ed. p. 26. note.

SAMPSON and Others, Assignees of COOK, a Bankrupt, *v.* BURTON and Others.

June 13.

1. Goods in the possession of a bankrupt, and, but for the bankruptcy, his property, being taken in execution after the act of bankruptcy, but two months before the issuing of a commission against the bankrupt, were (in *assumpsit* by the assignees of the bankrupt, on a guarantee given to the bankrupt,) described in the declaration as the goods of the bankrupt: Held, that such description was proper.

2. A guarantee against contingent damages cannot form the subject of a mutual credit under the 5 *Geo.* 2. *c.* 30. *s.* 28.

ASSUMPSIT on a guarantee. The case proved at the last *Devon* assizes, before *Wood* B. was as follows: *Cook* was a warehouseman at *Plymouth.* In *March* and *April*, 1817, the Defendants shipped for one *Andrews*, according to his orders, a quantity of gunpowder, which was received into the magazine of *Cook*, by the direction of *Andrews.* The Defendants, in *May*, 1817,

suspecting

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suspecting the insolvency of *Andrews*, endeavoured to stop the powder in *transitu*, and accordingly wrote to *Cook*, requesting him to obtain, on their behalf, the powder which they had sent to *Andrews*, and guaranteeing *Cook* from any responsibility or loss which should accrue to him for so doing. *Cook* did so retain the powder, and in *June*, 1817, delivered it to the Defendants. *Andrews* afterwards sued *Cook* in trover for the powder, and having obtained judgment against him, levied execution on his goods, on the 21st *November*, 1818. On the 18th of *February*, 1819, a commission of bankrupt issued against *Cook*, on a *secret* act of bankruptcy committed by him in *April*, 1818.

At the time of the bankruptcy *Cook* owed the Defendants 256*l.* 2*s.* 7*d.* upon a balance of accounts. The Defendants, among other objections at the trial, took an exception to the declaration, which in one count described the goods taken under *Andrews*'s execution as the goods of *Cook*, and in another stated that they were taken "as and for the goods of *Cook*," contending that this was a misdescription; the commission issued in *February*, 1819, having relation to the act of bankruptcy committed in *April* 1818, and, vesting the goods in the assignees from that time; so that they could only be described as the goods of the assignees. The Defendants also contended, that their guarantee constituted a mutual credit with *Cook*, and that, therefore, they were entitled, under 5 *G.* 2. (*a*), to set off against any sum recovered upon the guarantee, the sum of 256*l.* 2*s.* 7*d.* so due to them from *Cook*.

(*a*) *c.* 30. *s.* 28.

The

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The learned Baron thought that for the purposes of *Andrews's* execution, the goods were the goods of *Cook*, no commission having then been issued against him; and that the guarantee did not constitute a mutual credit; — but reserved the points for the consideration of this Court. Accordingly, the jury having found a verdict for the Plaintiffs.

Vaughan Serjt. obtained a rule *nisi* to set aside this verdict and enter a nonsuit, on these, among other grounds.

Pell and *Bosanquet* Serjts. now showed cause against the rule, and, on the first point, contended, that with reference to any act of *Andrews*, before the commission was sued out, the goods were properly described as the goods of *Cook*, he having a special property in them with respect to all but his own assignees. — This was rendered quite clear by the 49 *Geo.* 3. (*a*), by which all executions are protected, if levied more than two months before the commission was sued out. They cited *Webb* v. *Fox* (*b*), *Fowler* v. *Down* (*c*). On the second point, they urged that the guarantee only gave *Cook* a possibility of a right to sue, a possibility of a claim to unliquidated damages: that, if *Cook* or the assignees had been Defendants, the guarantee never could have been resorted to as a set-off, and, that, on these grounds, it was not entitled to be considered a mutual credit, *Glennie* v. *Edmunds* (*d*), *Crawford* v. *Stirling* (*e*).

Vaughan and *Hullock* Serjts., in support of the rule, as to the first point, denied that the 49 *Geo.* 3. *c.* 121. at all affected the question. That act allowed executions,

(*a*) *c.* 121. *s.* 2.
(*b*) 7 *T.R.* 391.
(*c*) 1 *B.* & *P.* 44.
(*d*) 4 *Taunt.* 775.
(*e*) 4 *Esp.* 207.

sued

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sued out two months before the issuing of a commission, to be valid notwithstanding any prior act of bankruptcy; but it did not alter the property of the goods, or make that the property of the bankrupt which was in truth the property of the assignees. — It enabled the party suing out the execution to take the assignees' goods without interruption; but it did not call those goods the goods of the bankrupt. — The bankrupt himself could not have called them his goods in an action of trover, and the assignees, standing in his place, were subject to the same law. *Fox* v. *Webb* and *Fowler* v. *Down* did not at all apply. As to the second point, it might be admitted that this guarantee could not constitute a set-off; but mutual credit, under 5 *G.* 3. *c.* 30., is by no means confined to such claims as might form the subject of set-off. The language of the Lord Chancellor in *Ex parte Smith* (*a*), is to the same effect. According to Lord *Ellenborough*, mutual credit, *ex vi termini*, imports unliquidated damages (*b*). In *Olive* v. *Smith* (*c*), goods placed in the hands of a broker were held to constitute a mutual credit; though, in that case, it could no more have been known beforehand what sum the goods might be sold for, than what sum the Defendants in this case might be called on to pay on their guarantee.

DALLAS C. J. I am of opinion that this rule ought to be discharged. — As to the objection that the goods taken under the execution of *Andrews* ought to have been described as the goods of the assignees, they were clearly the goods of *Cook* for this purpose, the execution having issued two months before the commission, and the statute 49 *Geo.* 3. (*d*) having enacted "that in all cases of commissions of bankrupt thereafter to be

(*a*) 1 *Swanst.* 34.

(*b*) In *Cumming* v. *Forester*, 1 *M.* & *S.* 499.

(*c*) 5 *Taunt.* 66.

(*d*) *c.* 121. *s.* 2.

issued,

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issued, all executions and attachments against the lands and tenements or goods and chattels of the bankrupts, *bonâ fide* executed or levied more than two calendar months before the date and issuing of such commission, shall be valid and effectual, notwithstanding any prior act of bankruptcy committed by such bankrupt, in like manner as if no such prior act of bankruptcy had been committed, provided the person at whose suit such execution or attachment shall have issued, had not at the time of executing or levying the same, any notice of any prior act of bankruptcy by such bankrupt committed, or that he was insolvent or had stopped payment." This, therefore, being an execution levied and executed two months before the commission, was, under the circumstances of the case, valid and effectual; that is, valid and effectual as against the goods of the bankrupt. — As to the arguments on the subject of mutual credit, I shall not say much. It was admitted that this guarantee could not form the subject of a set-off; but *Olive* v. *Smith* was referred to for the purpose of showing that it might operate as a mutual credit. The case of *Olive* v. *Smith* however, such as it was, is very distinguishable from the present case; for, there, the goods were placed with a broker for the purpose of being sold, and when sold, the sum received would certainly form an item in his account: here, the only mutual trust is of a very different description. The bankrupt has been trusted with a scheme of the Defendant's, and they enter into an undertaking resting on a contingency. There is no case which calls such a trust a mutual credit, and the case of *Glennie* v. *Edmunds* (a) entirely rules the present. — There it was held, that an underwriter could not establish as a mutual credit with the assured a loss accruing after the bankruptcy of the assured; so

(a) 4 *Taunt.* 775.

here,

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here, the loss incurred by a contingency after the bankruptcy of *Cook*, cannot be considered as a mutual credit existing between *Cook* and the Defendants at the time of his bankruptcy. But, independently of *Glennie* v. *Edmunds*, to call this a mutual credit would be to go far beyond any cases which have been hitherto decided.

PARK J. I am of the same opinion. If the persons levying the execution had known of the act of bankruptcy, the statute 49 *G.* 3. would not apply; but, as it is, there never was a case to which the statute more fully applied. The express object of it was to protect executions such as these. With respect to the mutual credit, the statute 5 *G.* 2. (*a*) enacts, "that where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall be due on either side on the balance of such account, and on setting such debts against one another, and no more shall be claimed or paid on either side respectively." It would be to be wished that such credit should be strictly confined to pecuniary transactions; it is, however, too late to lament the extension of such credit, since the case of *Ex parte Deeze* (*b*), though it may be said that the principle is carried quite far enough in that case. Whether *Olive* v. *Smith* has met with the approbation of *Westminster-hall* I will not now say; but this point was much considered in the case of *Rose* v. *Hart*, determined in this court in *Trinity* term 58 *G.* 3.

(*a*) c. 30. s. 28. (*b*) 1 *Atk.* 228.

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The result of the decision in that case was, that the doctrine of mutual credit might be extended to cases where the property would form an item in a future account between the parties, but not to cases where there is a mere deposit of property; and I do not feel disposed to vary from that decision.

BURROUGH J. The answer to the objection touching the description of the goods is sufficiently furnished by the stat. 49 *G.* 3. But the allegation would have been sufficient without that statute; for, at the time of levying the execution, the goods were the property of *Cook*. At all events the statement, that the goods were taken *as and for* the goods of *Cook*, is a correct statement of the fact. As to the mutual credit, *French* v. *Fenn* (*a*) and *Rose* v. *Hart* have decided the question. In *French* v. *Fenn*, *Cox*, the bankrupt, was indebted to *Fenn*, and had entrusted him with his share or interest in a string of pearls to be sold by *Fenn*, and the profit on such share was to be paid to *Cox*; *Fenn* sold the pearls after *Cox*'s bankruptcy, and *Cox*'s assignees brought an action against *Fenn* for *Cox*'s share of the profit; on the part of the defendant it was insisted, that there was a mutual credit, though not a mutual debt, at the time of the bankruptcy, and that one could not be demanded without satisfying the other. Lord *Mansfield*, in that case, said, "the act of parliament is accurately drawn to avoid the injustice that would be done if the words were only mutual debts, and it therefore provides for mutual credit. In this case credit is given to the Defendant for a row of pearls which is to belong in thirds to three persons. As *Fenn* advanced the whole money, the other two were to pay him interest for their shares till the pearls were sold; there is no doubt there was a mutual

(*a*) *Co. B. L.* 7th ed. 536.

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credit. *Cox* had trusted him with the pearls, and he had trusted *Cox* with other goods, which, in all probability, he would not otherwise have done." In *Rose* v. *Hart*, trover was brought by the assignees of *Smart*, a bankrupt, for cloths left by *Smart*, before his bankruptcy, with the Defendant, who was a fuller, to be dressed. There was then a balance due from the bankrupt to the Defendant for work done on other cloths. The assignees tendered to the Defendant the sum due for work done on the cloths in his possession, and demanded them from him; but the Defendant refused to deliver them up, unless he was paid his general balance. The question was, whether he was entitled to retain them for that balance; and *Holroyd* J., before whom the cause was tried, at *Sarum* Spring assizes, 1818, reserved the point for the opinion of this Court. We had, I remember, several meetings on the subject, and the opinion of the Court was, that the Defendant, who received these cloths for the purpose of dressing only, had no right to detain them for his general balance. Lord Chief Justice *Gibbs*, in the course of delivering that opinion, after reading the 28th section of the statute 5 *G.* 2. *c.* 30., said "Something more is certainly meant here by mutual credit than the words mutual debts import, and yet upon the final settlement it is enacted merely that one debt shall be set against another. We think this shews that the legislature meant such credits only as must in their nature terminate in debt; as where a debt is due from one party and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side and a delivery of property with directions to turn it into money, on the other." These two cases taken together explain the intention of the statute. The intention was to confine mutual credit to pecuniary demands, or to those subjects, which at some subsequent

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quent time might become of a pecuniary nature. Now, look at this case. Has it the semblance of a pecuniary demand? It is a mere guarantee, on which there is only a contingent claim for unliquidated damages; and here, before verdict given, is an attempt to call it a mutual credit. I think that there was no ground for the objection made at the trial, and that this rule must be discharged.

RICHARDSON J. I am of the same opinion. For all the purposes of this question the statute 49 *G.* 3. renders these goods the goods of *Cook*, and the assignees cannot invalidate the execution. With regard to the question of mutual credit, the statute 5 *G.* 2. considers credit and debt as something in the nature of an account which may be set against some other account. That statute, however, has been held to extend to a deposit of goods, but by the last decision the doctrine has properly been confined to goods deposited with a view to a sale, the proceeds of which should form an item in an account. The present case goes much farther, for it is only a contract to indemnify upon a contingency, and *Glennie* v. *Edmunds* is directly opposed to such an extension of the doctrine of mutual credit.

Rule discharged.

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June 13.

DANIEL EDGE Demandant, SAMUEL TAYLOR Tenant, WILLIAM WARREN and Wife Vouchees.

The Court allowed the writ of entry in a recovery suffered 56 *G.* 3. to be amended by altering the names of the parties, on affidavit that the recovery was intended to be suffered according to the amendment prayed, and that all the parties were living and consenting to the motion.

THIS recovery was suffered in *Michaelmas* term, 56 *Geo.* 3. And

Vaughan Serjt. now moved, that the writ of entry be amended by altering the names of the parties as follows, viz. *Thomas Harris* Demandant, *Daniel Edge* Tenant, *William Warren* and wife vouchees, on an *affidavit* which stated that the parties were so intended to be named by the deed to make a tenant to the *præcipe*, that, by mistake, the recovery was suffered with the wrong names, and that all the parties were living and consenting to the motion. He cited many instances where such an amendment had been allowed, from *Pigott on Fines and Recoveries* (*a*).

The Court, after some little hesitation, allowed the amendment.

(*a*) 170. See also *Cruise's Digest*, vol. v. pp. 436. & 160. *Lord* v. *Briscoe*, *Barnes*, 24.

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TEAL *v.* AUTY and DIBB.

June 13.

Defendants were sued for the price of some growing trees, which they had purchased, cut down, and carried away; a witness proved an admission by one of them that something was due, and a promise to pay. At the time of the bargain written memoranda had been made of the transaction; but these memoranda (one of them an item in a book of accounts,) being neither stamped nor signed with the names of the parties, were not produced in evidence, and the Plaintiff was nonsuited: Held, that the nonsuit was proper.

ASSUMPSIT for the price of some poles, which Defendants had purchased when growing, and had afterwards cut and carried away. The declaration contained also a count upon an account stated. At the trial before *Bayley* J. (*York* Spring assizes, 1820), it appeared, that written memoranda had been made of the transaction at the time of the bargain. These memoranda (one of them an item in a book of accounts) being neither stamped nor signed with the names of the parties, were not produced in evidence. A witness stated that *Auty*, after the poles were carried away, admitted something to be due, and promised to pay. The learned Judge directed a nonsuit.

Hullock Serjt., having obtained a rule *nisi* to set aside this nonsuit, and have a new trial,

Vaughan Serjt. shewed cause against the rule. The nonsuit was proper, because this transaction having been accompanied with a writing, no parol evidence was admissible till that writing was produced: — but the writing was inadmissible on two grounds; first, as having no stamp; secondly, as not containing the names of the parties to be charged; which it ought to have done, pursuant to the statute of frauds, the growing trees being an interest in land. *Waddington* v. *Bristow* (*a*), *Emmerson* v. *Heelis* (*b*), *Crosby* v. *Wadsworth*. (*c*)

Hullock, in support of his rule. It is not necessary for the plaintiff to impeach any of those cases. If a

(*a*) 2 *B. & P.* 452.
(*b*) 2 *Taunt.* 38.
(*c*) 6 *East*, 602.

 parol

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parol contract, touching an interest in land, be not executed, the party cannot enforce it unless he have a memorandum in writing, signed by the person to be charged, as well as by himself: but where the contract is executed, such evidence of it is no longer necessary; it is sufficient, if, as here, the purchaser has cut down his poles and carried them away. The Plaintiff here, has established his claim by evidence *aliundè* and independent of the writing, and he is entitled to have at least a nominal verdict upon the evidence given as to the account stated. *Knowles* v. *Michel.* (*d*) Then there was no agreement here, for the memorandum without signature does not constitute an agreement under the statute of frauds for any interest in land; and, if the memorandum was no agreement, there could be no ground for stamping it.

Sed per Curiam. The learned Judge who directed this nonsuit was perfectly right, and on that subject we feel no difficulty. But, adverting to the facts of this case, we find it to have been originally an agreement for the purchase of an interest in land, namely, growing poles; if, therefore, an action had been brought to enforce such a contract, the objection that the memorandum attesting it was not signed by the parties and stamped, would have been well founded: here, however, there are other circumstances, and, whatever the original agreement might have been, the poles were taken away and the agreement was executed; and if the Plaintiff could have proved the amount due to him by any other evidence, there might have been no necessity for referring to the original agreement. We need not refer to a variety of cases, where upon an executed agreement the party has been entitled to recover, al-

(*a*) 13 *East*, 249.

though

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though he could never have prevailed had the contract been contested before it was executed. Here it is contended that the Plaintiff is entitled to recover upon the account stated; but the witness called to prove that, did not speak to an admission of any definite amount, and in the case referred to, a promise for a precise sum was proved. The promise to pay in the present case was probably made with reference to the written memorandum, but that, not being stamped, could not be admitted in evidence. The difficulty, in this case, is to ascertain what was due; and, in the absence of proof to such effect, the direction for a nonsuit was proper. However, under the circumstances of the case, we think the Plaintiff ought to be permitted to go down to trial on payment of costs; and, if on enquiry of the learned Judge who tried the cause, it should appear that the witness spoke to an admission of a definite sum, the Plaintiff would be entitled to a verdict.

Adjornatur.

The Court afterwards said that the learned Judge who tried the cause had no recollection of the admission of any definite sum being due, but they still thought that the Plaintiff ought to have a new trial upon the terms above mentioned.

Rule for a new trial absolute,
on payment of costs.

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June 14.

SAMUEL KNIGHTS, Administrator, v. FRANCIS THOMAS QUARLES, Gent.

Plaintiff, as administrator, declared in *assumpsit* that Defendant, for certain fees to be paid him by intestate, undertook as attorney to investigate and see that a title about to be conveyed to intestate was a good one: breach, that he omitted to do so, and that intestate in consequence took an insufficient title, whereby his personal estate was injured. Defendant having demurred, the demurrer was overruled.

ASSUMPSIT. The declaration stated that before the time of making the promise therein contained, and in the life-time of the deceased, the deceased had contracted with one *Savory* for the purchase of certain premises at *Thetford*, which *Savory* assumed to have sufficient power and title to sell and convey to the deceased; and thereupon, in the life-time of the deceased, (in consideration of the premises, and that the deceased, at the special instance and request of the Defendant, had retained and employed the Defendant as his attorney and solicitor, to ascertain and investigate the title of *Savory* to the said premises, and to cause and procure the same, and a good title thereto, to be duly and effectually conveyed by *Savory* to the intestate as purchaser, for certain fees to be therefore paid by the intestate to the Defendant,) the Defendant undertook and promised the deceased, in his life-time, to perform and fulfil his duty in the premises. Breach, that although it was the duty of the Defendant, by virtue of his retainer, to investigate carefully the title of *Savory* to the premises, and to take due and proper care that a bad title to the same should not be accepted by the deceased, yet the Defendant, not regarding his duty in that behalf, but contriving and fraudulently intending, &c., did not nor would carefully investigate the title of *Savory* in the premises, or take due or proper care that a bad or insufficient title was not accepted and received by intestate, but on the contrary the Defendant wholly neglected and refused to do so; and in the life-time of the deceased the Defendant, in violation of his pro-

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mise and undertaking, caused and procured, &c. the deceased, without his knowledge or consent, to accept and receive, and the said deceased in his life-time did accordingly accept and receive from *Savory* a bad, defective, and insufficient title to the said premises; and thereupon such title was conveyed by *Savory* to the deceased in his life-time, and the deceased paid *Savory* as the consideration-money in that behalf 2000*l.*, by means of which the deceased, in his life-time and until his death, held the premises on a bad and insufficient title, and was in his life-time wholly unable to sell or dispose of the same. The count then alleged special damage to the deceased and his personal estate. The declaration contained other counts, varying the statement of the contract, in one of which counts the Defendant was charged generally and not as an attorney. To these counts the money counts were added.

Demurrer and joinder.

Doyly Serjt., for *Blosset* Serjt., in support of the demurrer. This action, though in form *ex contractu*, is in substance *ex delicto*, the breach of promise complained of being no more than a tort arising out of a neglect of duty. In proof of this, it may be observed that the action against parties for negligence or ignorance in a profession, has uniformly been conceived in case, and a Plaintiff cannot by varying his form of action vary also his rights. Then it is clear that an action by the representatives of the deceased for a mere wrong committed against the deceased and unaccompanied with any breach of contract, does not lie, unless that wrong immediately affect his personal estate, *Lucy* v. *Levington* (*a*), as, for instance, a conversion of goods in the life-time of the deceased. If the law were otherwise every case of deceit might be converted into an implied *as-*

(*a*) 2 *Levinz*. 26.

 sumpsit,

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sumpsit, and parties be enabled to sue in cases where it has been clearly held, that the action dies with the deceased. But, supposing that by a forced construction the duty of the Defendant in this case could be called a contract; at all events it is an implied contract, and though an action will lie against an executor for breach of the express contract or covenant of his testator, the law has been considered otherwise with respect to an implied contract. This too is a contract regarding land, and the heir should have sued, not the administrator. The declaration is defective in not alleging, that it was the Defendant's profession to ascertain the title of estates; and if it was not, he incurred no liability; for it was the Plaintiff's folly to employ an incompetent person.

The Court stopped *Frere* Serjt. who was to have argued for the Plaintiff, expressing an unanimous opinion that there was no ground for the demurrer, an express promise being alleged, a breach of it in the life-time of the intestate, and an injury to his personal property, the truth of which allegations was admitted by the demurrer; that it made no difference in this case whether the promise were express or implied, the whole transaction resting on a contract; that though, perhaps, the intestate might have brought case or *assumpsit* at his election, *assumpsit* being the only remedy for the administrator, it was very necessary the action should be maintained or the Defendant might escape out of the consequences of his misconduct, and the intestate's estate suffer an irreparable injury. It was further observed, that if a man contracted for a safe conveyance by a coach, and sustained an injury by a fall, by which his means of improving his personal property were destroyed, and that property in consequence injured, — though it was clear, he in his life-time might at his election sue the coach proprietor in contract or in tort, it could not be doubted that his executor might

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sue in *assumpsit* for the consequences of the coach proprietor's breach of contract. That it could not be pretended that the contract of the Defendant in this case was a contract running with the land; but if it were so, an action would lie by the administrator for a breach and damage incurred in the time of the testator; and as to the alleged omission of certain averments in the declaration, respecting the Defendant's profession, at all events the admission of an express promise, implied by the demurrer, rendered any such allegation unnecessary.

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Judgment for the Plaintiff.

PHILLIPS and CAREY Demandants, NOUNE Tenant, LISLE Vouchee;

AVERY and PHILLIPS Demandants, WHITAKER Tenant, LISLE Vouchee.

June 20.

PELL Serjt. moved to amend two recoveries, one suffered in *Trinity* term, 1st *Wm.* & *Mary*, and the other in *Hilary* term, 13 *Geo.* 1., by inserting the word *tithes.*

By the deed to lead the uses of the first recovery, Dame *Mary Lisle* and *Edward Lisle* conveyed to *John Noune* to make him tenant to the *præcipe* in such recovery, all those the manors and farms of *Briddlesford* and *Chilterton*, and *Briddlesford* woods, then in the occupation of Dame *Mary Lisle*, her tenants and assigns, and all other the manors, messuages, services, rents,

By a deed to lead the uses of a recovery suffered in *Trinity* term, 1 *W.* & *M.*, *M. L.* and *E. L.* conveyed to *J. N.*, to make him tenant to the *præcipe*, all the manors and farms of *B.* and *C.* then in the occupation of *M. L.*, her tenants and assigns, and all other the manors, messuages, services, rents, lands, tenements, and *hereditaments*, in the county of *S.* and isle of *W.* of them, *M.L.* and *E.L.*, or either of them: By a deed to lead the uses of a recovery suffered in *Hilary* term, 13 *G.* 1., *M. L.* and *E. L.*, son of *E. L.*, conveyed the before-mentioned *hereditaments* and premises to *D. W.*, to make him tenant to the the *præcipe:* The tithes had been enjoyed with the lands, since the time of *James* the First: The Court refused to amend these recoveries by inserting the word *tithes.*

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lands, tenements, and *hereditaments* in the county of *Southampton* and *Isle of Wight*, of them the said Dame *Mary Lisle* and *Edward Lisle*, or either of them.

By the deed to lead the uses of the second recovery, the said *Mary Lisle* and *Edward Lisle*, son of the said *Edward Lisle*, conveyed the before-mentioned *hereditaments* and premises to *Daniel Whitaker*, to make him tenant to the *præcipe* in such recovery.

The tithes of the lands in question, as well as the lands, were granted by *James* the First to *Francis Morris* and *Francis Phillips* : — *Morris* and *Phillips*, (as appeared by the recital of an indenture made between Sir *Thomas Flemynge* and *John Earlisman* of the one part, and *Thomas Lysle* of the other part,) conveyed them in 1610 to *Flemynge* and *Earlisman*, and *Flemynge* and *Earlisman* conveyed them the same year to *Thomas Lysle*, an ancestor of *Edward Lisle* the father, before-mentioned.

From the time of the grant of the crown to the year 1775 the tithes had been enjoyed with the lands, and in 1775 were conveyed, together with the farm at *Briddlesford*, by *James Barton* to *Joseph Tarver* and *William Hearne*. *Hearne* afterwards conveyed his moiety to *Tarver*, and *Tarver* conveyed the whole to *Hunt*. *Tarver* never paid tithes. — A purchaser to whom *Hunt* sold the property, objecting to the omission of the word "tithes" in the recoveries of 1 *Wm.* & *Mary* and 13 *G.* 1.

Pell contended that the word *hereditaments* in the respective deeds to lead the uses of those recoveries, was sufficiently comprehensive to include tithes under the circumstances above mentioned, and to warrant the amendment prayed for. He cited *Cullum* demandant, *Ryder* tenant, *Vernon* vouchee (*a*); *Corden* demandant, *Hall* tenant, *Colclough* vouchee (*b*); and *Collier* demandant, *Lord Chesterfield* vouchee. (*c*)

(*a*) 7 *Taunt.* 341.
(*b*) 2 *N. R.* 431.
(*c*) 4 *Taunt.* 226.

But

But the Court thought, that there was no satisfactory ground to shew, that the parties to the recoveries in the time of *William* & *Mary* and *George* the First were in possession of the tithes, and

Refused the amendment.

EDMUND TURNOR, Esq. *v.* TURNER, Clerk.

June 21.

1. A declaration on a replevin bond (conditioned for the Plaintiff in replevin to appear at the county court and prosecute his suit with effect, and make a return of the cattle, goods, &c. distrained, if a return should be adjudged) after alleging that the plaint was removed into the court above, that the Defendant avowed, and that, Plaintiff in replevin having omitted to plead to the avowry, a judgment for a return was awarded, averred, that the Plaintiff in replevin did not prosecute his suit with effect. A plea, that, after the judgment for a return, a writ to enquire of the arrear of the rent and the value of the cattle, goods, &c. distrained, was prayed by the avowant, granted, and executed, and that thereupon avowant had judgment to recover the arrear of rent found, together with a sum for his costs and damages, was held ill, on demurrer.

2. Sureties in a replevin bond are not discharged by the execution of a writ of enquiry, under 17 *Car.* 2. *c.* 19. *s.* 23., and a judgment thereon for avowant to recover the arrear of rent found, together with a sum for his costs and damages.

THIS was an action on a replevin bond, brought by *Edmund Turnor*, assignee of the sheriff, against *Samuel Turner*, one of the sureties in the bond; the condition of which bond was, that *Jonathan Watmough* should appear at the county court, on the 22d *February* then instant, and prosecute his suit with effect against the said *Edmund Turnor*, for taking and unjustly detaining his cattle, goods and chattels, and make a return thereof, if a return should be adjudged. The declaration stated, that *E. T.* distrained the cattle, goods, and chattels of *Jonathan Watmough*, for rent due, that the sheriff replevied, and delivered the said cattle, goods and chattels to *Jonathan Watmough*, who afterwards appeared, and levied his plaint against *E. T.*, for taking and unjustly detaining his cattle, goods, and chattels, and found pledges as well for prosecuting the said plaint, as for returning the said cattle, goods, and chattels, if return should be adjudged; that this plaint was removed into this court, and that thereupon the said *Jonathan Wat-*

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mough complained against *E. T.* for taking and unjustly detaining his cattle, goods, and chattels in a certain dwelling-house, and thereupon *E. T.* avowed the taking for rent *arrere*, and that *Jonathan Watmough*, not pleading in bar to such avowry, it was considered by the Court, that he should take nothing by his said plaint, but that he and his pledges should be in mercy; that *E. T.* should have a return of the said cattle, goods, and chattels. Then the declaration averred, that *Jonathan Watmough* did not prosecute his suit with effect, whereupon the sheriff assigned the bond to the Plaintiff. The Defendant pleaded in bar, that, after the said judgment in *Trinity* term, 55 *G.* 3., the said *E. T.* prayed the writ of the king to the sheriff of *Lincoln*, to enquire of the arrear of the rent, and the value of the cattle, goods, and chattels so distrained, which writ was granted and executed, and the inquisition thereupon was returned, that 367*l.* 10*s.* was due for rent, and that the cattle, goods, and chattels were worth that sum; and that thereupon *E. T.* had judgment against *Jonathan Watmough*, to recover the said sum, and 79*l.* 5*s.* for his costs and charges; and that *E. T.* should have execution thereof. To this plea the Plaintiff demurred. This demurrer was argued in *Easter* term last.

Blosset Serjt., in support of the demurrer. — The plea does not answer the breach; when a bond is given to prosecute with effect and to make a return, a plea which does not aver a prosecution with effect as well as a return, is ill; where there is an obligation conditioned to do several things, the obligation is forfeited on the breach of one. What damages the Plaintiff may or may not have sustained by breach of the condition to prosecute with effect, is quite another consideration; if he has sustained none, that will appear on the writ of enquiry, but the object of this bond is, to secure the costs

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costs as well as the rent; all the conditions of the bond are distinct and independent; this is laid down by *Lee* C. J. in *Morgan* v. *Griffiths* (*a*). "In all replevin bonds there are several independent conditions; one to prosecute, another to return the goods replevied, and a third to indemnify the sheriff; and a breach may be assigned upon any of these distinct parts of condition." The first condition to prosecute with effect was introduced by *statute*, as a remedy for the tedious proceedings against pledges. — The condition to make return, was introduced from the custom of taking pledges *de retorno habendo*, which were wholly distinct from the pledges for prosecution. There are cases in which a breach of one of the conditions of a replevin bond has been deemed a sufficient cause of action, without alleging any breach of the other. *Vaughan* v. *Norris* (*b*), *Dias* v. *Freeman* (*c*), *Gwillim* v. *Holbrook* (*d*). The legal meaning of the term prosecuting with effect is prosecuting with success, as the object of the condition is to secure the party's costs. This is clear in the case of pledges on other actions (*e*) as well as in replevin (*f*) *Ormond* v. *Bierly* (*g*). It appears, also, from the determinations on the stat. 4 *Ann*, c. 16. s. 16., as to the making of an entry or claim to avoid a fine, upon which an action must be commenced within a year and prosecuted with effect (*h*). Whatever effect, therefore, the judgment to make a return, and the return itself, may have towards satisfying the condition for a return, it can have none towards satisfying the condition to prosecute with effect, (*Cooper* v. *Sherbrooke* (*i*), *Baker* v. *Lade*) (*k*) which was intended to give the landlord security for his

(*a*) 7 *Mod.* 380.
(*b*) *Cas. Temp. Hardw.* 137.
(*c*) 5 *T. R.* 195.
(*d*) 1 *B. & P.* 410.
(*e*) *Carth.* 519. per *Holt*, C.J.
(*f*) *Gilb. Replevin*, 95.
(*g*) *Carth.* 510.
(*h*) See *Adams on Ejectm.* 93. 94. last ed.
(*i*) 2 *Wils.* 117.
(*k*) *Carth.* 253.

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costs against a vexatious tenant. *Yea* v. *Lethbridge* (*a*), *Page* v. *Eamer*. (*b*)

Cross Serjt., *contrà*. The conditions of the bond are in the alternative; either that the party shall prosecute with effect, or that he shall make a return. If it were otherwise, the Defendant, though satisfied by a return, might go on for damages. In all the cases where after a return has been adjudged, the avowant has sued for an omission to prosecute with effect; the return, though adjudged, was never made, so that the party was without any satisfaction. After judgment for the Defendant, by the common law, a writ *de retorno habendo* was awarded (*c*), and before the party calls on the sureties, he should endeavour to obtain a return. Instead of that, he waives the benefit of the judgment for a return; and he takes the benefit of the stat. 17 *Car*. 2. by suing out a writ of enquiry: Upon this writ he enters up judgment for damages, and entitles himself to an execution by *fi. fa.* This execution would give him all the goods he could have taken under the judgment for a return, and all the other goods of the Plaintiff too: so that the judgment for a return, is merged in the judgment upon the writ of enquiry. *Cooper* v. *Sherbrooke* is in point, and it is laid down in the books of practice, that where a party sues out a writ of enquiry under 17 *Car*. 2., he cannot afterwards go against the pledges (*d*). At all events the declaration is bad, for it does not show that the party did not prosecute with effect; it shows that judgment was entered up for a return; and when that was done there was an end of the suit. The allegation should have been, that no return was made; all the precedents are so; either that the party did not prosecute with effect, because no judgment

(*a*) 4 *T.R.* 433.

(*b*) 1 *B.* & *P.* 378.

(*c*) *Com. Dig. Pleader*, 3. K. 31.

(*d*) *Tidd.* 1081. 6th ed.

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was arrived at, or that there was a judgment, but no return.

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Blosset, in reply. It appears from *Cooper* v. *Sherbrooke*, that even where there is a judgment for a return, an enquiry may be had under 17 *Car.* 2. It is not necessary, therefore to show that no return has been made. The declaration here is the same as in *Dias* v. *Freeman*, and the judgment itself, or the sort of judgment, makes no difference in the case, the only question being whether the party has prosecuted with success. *Baker* v. *Lade* shows, that the judgment under 17 *Car.* 2. is cumulative, and does not affect the common law. No case is cited in *Tidd*, and he only states, that, if a party has a judgment and an enquiry, he cannot sue on the breach for not returning: but this position does not affect the breach for not prosecuting with effect.

Cur. adv. vult.

DALLAS C. J. having stated the case and pleadings, as above set forth, now delivered the judgment of the Court.

The question which the Court has to decide is, whether this plea is a good bar to the Plaintiff's action, which action is against one of the sureties in the replevin bond, the condition of which is set out in the declaration; and it appears to have been that *Jonathan Watmough* should prosecute his suit with effect against the said *Edmund Turnor*, for taking and unjustly detaining his cattle, goods, and chattels, and make a return thereof if a return should be adjudged. We think the condition of the bond was broken; by the Plaintiff in replevin becoming nonsuit he has not prosecuted his suit with effect. Although it appears by the declaration, that a return of the cattle, goods, and chattels was awarded, yet we think the avowant had his election, whether he would proceed by a writ *de retorno habendo*,

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or by the course which he has pursued, namely, the issuing of a writ of enquiry under the statute of *Charles* 2.

If the Court were to decide, that this plea was a good bar to the Plaintiff's action, it would follow, that the avowant or person making cognizance for rent, would not derive from the sureties in the replevin bond, the benefit which was intended to be given to them by the statute 11 *Geo.* 2. (*a*)

The statute 17 *Car.* 2. (*b*) enacts "that wheresoever a Plaintiff in replevin shall be nonsuit before issue joined, the Defendant making a suggestion in nature of an avowry or cognizance for the rent, to ascertain the cause of distress, the Court, upon his prayer, shall award a writ to enquire by a jury touching the sum in arrear at the time of the distress and the value of the goods taken, and, upon the return of the inquisition, the defendant is to have judgment to recover against the Plaintiff the arrearages of such rent, in case the goods distrained shall amount to such value;" and similar provisions are made where the Plaintiff becomes nonsuit after cognizance or avowry made, as this case was.

The parties to the replevin suit are the person whose goods are distrained and the person making the distress. Previous to the statute 11 *Geo.* 2., if he, whose goods were distrained, was a person of little worth, so that the avowant or person making cognizance for rent could have no fruit of his judgment on the inquisition under the statute *Car.* 2., he was driven to an intricate proceeding against the sheriff, if he had not taken sufficient pledges, which, by former statutes, he was directed to do, or to a proceeding in the sheriff's name against the pledges taken by the sheriff, if he had taken a bond from the pledges.

Great delays and inconveniencies attending this course of proceeding, the legislature, in the eleventh year of the

(*a*) c. 19. s. 23. (*b*) c. 7. s. 2.

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reign of *George* the second, to prevent (as the statute says) vexatious replevins of distresses taken for rent, enacted, "That all sheriffs and other officers having authority to grant replevins, may and shall, in every replevin of a distress for rent, take in their own names, from the Plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by oath of one or more credible witnesses), and conditioned for prosecuting the suit with effect, and without delay, and for duly returning the goods distrained, in case such return shall be awarded before any deliverance be made of the distress; and that such sheriff or other officer taking any such bond shall, at the request and costs of the avowant, or person making cognizance, assign such bond to the avowant, or person aforesaid by indorsing the same," (in the manner mentioned in the act). And the act then provides, that, if the bond so taken and assigned be forfeited, the avowant or person making cognizance, may bring an action and recover thereupon in his own name.

It is quite clear from the language of this act, that the legislature meant to give the avowant, or person making cognizance, a further and additional security, and to place him in a better situation than he was in under the law as it then stood. But this act has another wise provision; for, the framers of the act, fearing that this indulgence might be used vexatiously, have introduced this clause, namely, that the Court, where such action shall be brought, may, by a rule of the same Court, give such relief to the parties upon such bond, as may be agreeable to justice and reason, and such rule shall have the nature and effect of a defeazance to such bond.

If the plea had stated, that an execution had issued on the judgment, and the sum recovered had been levied

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and paid to the avowant before this action was commenced, the case would have come before us in a very different shape. It is sufficient to say that this is not alleged. We think that this action is well brought, and that the plea is no bar to it. If the action shall be enforced, so as to work injustice, the Defendant has a plain remedy, under the statute 11 *Geo.* 2., by an application to this Court for relief.

Judgment for the Plaintiff.

(IN THE EXCHEQUER CHAMBER.)

MONKHOUSE, WRIGHT, and FAIRBAIRN, *v.* HAY and Others, Assignees of MATTHEWS, a Bankrupt. In Error. (*a*)

1. A trader assigned a ship to *A.* in trust, to pay a debt due from the trader to *A.* and his partners, but with their permission retained the possession and disposition of the ship at the time of his bankruptcy: Held, that the ship passed to the assignees under the commission of bankruptcy, by virtue of the 21 *Jac.* 1. *c.* 19. *s.* 11., although before the act of bankruptcy the register was indorsed to *A.*, and shortly afterwards (three months before the issuing of the commission) the ship was newly registered in his name, and continued so registered at the time the commission was issued. — 2. The 21 *Jac.* 1. *c.* 19. *s.* 11. is not repealed as to shipping, by the ship register acts.

ASSUMPSIT for money had received by the Defendants below (Plaintiffs in error) to the use of the Plaintiffs below, (Defendants in error;) assignees of *Thomas Matthews*, a bankrupt. A special verdict found the following facts. *Matthews* the bankrupt, the registered owner of a ship called *The Dolphin*, being indebted to the Defendants below, by indenture (reciting the certificate of the registry of the ship) dated the 22d *November*, 1815, assigned the ship, then at sea, to the Defendant, *Fairbairn*, as a security for the debt of himself and his co-

(*a*) See 2 *B.* & *A.* 193.

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co-partners, the other Defendants below; the ship to be sold if the debt was not paid in a certain time. The deed contained a covenant by *Fairbairn*, to re-assign the ship to the bankrupt, on payment of the debt before the sale; and, that, until the ship should be sold under the deed, *the bankrupt was to be permitted to have, hold, and enjoy the same, and to receive and take the gains and profits for his own use and benefit.* A copy of this deed was delivered, on the 22d *November*, 1815, to the proper officer of the custom-house at *Sunderland;* the ship returned a few days afterwards: on the 29th of *November*, 1815, the proper indorsement was made on the certificate of the registry, and on the 31st *January*, 1816, *Fairbairn* obtained a new register in his own name. At the time of the execution of the assignment, the bankrupt had the possession of the ship, and continued from that time, until the 1st of *June*, 1816, to exercise all the acts of ownership, by appointing captains, dispatching the ship on voyages in *January* and *April*, 1816, and from time to time repairing and insuring her at his own expence; but she was navigated under the certificate of registry, which had been granted to *Fairbairn*, in compliance with the register acts. The Defendants below never interfered in any way with the conduct or management of the ship, until the 1st *June*, 1816, when, on the return of the ship from a voyage on which she had been chartered by the bankrupt in *April* 1816, they took possession of the same, displaced the master from his command, and re appointed him under themselves. On the 11th of *May*, 1816, a commission of bankrupt had issued against *Matthews*, who had committed an act of bankruptcy, in *December*, 1815. The demand of the Defendants below upon the ship, had been reduced by payments to 595*l.*, and the clear proceeds, remaining in their hands after the sale, amounted

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to 585*l.*, but whether, &c. Judgment for the Plaintiffs below.

Parke, *James*, for the Plaintiffs in error. 1st. Since the passing of the register acts, the stat. 21 *Jac.* 1. *c.* 19. *s.* 11. does not apply to *British* ships. 2d. Enough is not found on the verdict to entitle the Defendants in error to recover.

Upon the statute of *James* the mere possession of the bankrupt, even at the time of bankruptcy (*Jones* v. *Dwyer*) (*a*) does not entitle the assignees to recover, unless he has also the reputed ownership in the thing possessed, and has taken on himself the disposition of it, as owner: in *Lingham* v. *Biggs*, (*b*) *Eyre* C. J. says, "Being allowed to have the possession of goods under circumstances which give the reputation of ownership, brings the case within the statute. The possession, therefore, must be accompanied at least with the apparent power of selling: but, since the passing of the registry acts (*c*), *British* registered ships cannot be transferred without an accompanying documentary title: apparent possession is not that which entitles the possessor to pass them, as in the case of ordinary goods. *Ex parte Yallop* (*d*). This case resembles that of a chattel interest in land, which has been held not to be within the statute, *Ex parte Marsh* (*e*), and the judgment of *Burnet* J. in *Ryall* v. *Rolle* (*f*), shows why: "As to the possession of the goods, I have no way of coming at the knowledge of the owner, but by seeing who is in possession of them, but the possession of land is of a different nature for a man may be in possession of land as tenant at will, as a mortgagor is to the mortgagee be-

(*a*) 15 *East*, 21.
(*b*) 1 *B.* & *P.* 87.
(*c*) 26 *G.* 3. *c.* 60. 34 *G.* 3. *c.* 68.
(*d*) 15 *Ves. jun.* 60.
(*e*) 1 *Ves. sen.* 352.
(*f*) 1 *Atk.* 168.

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fore the condition broken. A purchaser may call for the title deeds and need not be deceived unless he will." So Lord *Kenyon* says, in *Gordon* v. *East India Company* (a), "The case of real property is in a different situation; no purchaser is satisfied with the mere possession of an estate; before he purchases he calls for the title deeds, and examines whether or not the possessor is entitled to the estate; but the possession of personal property is generally the title on which the world relies." — The Court will not extend the statute of *James*, because it is productive of many hardships, and though it might have been useful when the operations of trade were few and simple, the case is very different now, when apparent possession does not confer the credit which it used to do.

Secondly, the jury have not found the reputed ownership to be in the bankrupt, and, unless they do so, the Defendants in error can have no right to recover: it was said by *Eyre* C. J., in *Lingham* v. *Biggs*, "It was well observed by Mr. Justice *Buller*, in *Walker* v. *Burnell*, that questions on the 21 *Jac.* have much more of fact than of law in them." It may be admitted, that, if the jury find a fact or facts to which no other fact is opposed, the Court may be left to draw an inference; but here the jury find conflicting evidences of ownership, and omit to strike the balance between them. If a ship were let for years, as in *Frazer* v. *Marsh* (b), the jury would be bound to decide in whom was the reputed ownership at the time of the bankruptcy, and they are equally bound to do so in the present case. In *Muller* v. *Moss* (c), Lord *Ellenborough* says, "Reputed ownership is a fact which ought to have been found."

(a) 7 *T. R.* 234.
(b) 2 *Campb.* 517.
(c) 1 *M. & S.* 335.

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Tindal, for the Defendants in error. — As to the second point, in all the cases on this subject, there has been a mixture of fact and law, and it has been left to the Court to decide, whether, under the facts, the reputed ownership was in the bankrupt. If the jury find the reputed ownership to be in him, no question can be left for the Court; therefore, taking the special verdict as it now stands, there is enough to entitle the Defendants in error to recover.

As to the first and main point, this case falls within the statute of *James*, unless the ship register acts operate as a repeal of that statute as far as ships are concerned. But the ship registry acts relate to objects entirely different from the objects of the statute of *James*. The object of the registry acts being to exclude the competition of foreign shipping, that of the statute of *James* to prevent false credit. Then, the possession and management of the ship continued by the bankrupt so long after the transfer, is a sufficient reason for calling this a case of reputed ownership. It is contrary to daily experience, that parties who supply a ship with necessaries, should have recourse to the documentary title; the person who puts himself forward as apparent owner, is the person charged, and liable upon evidence that he has acted in such a capacity. It would be a great inconvenience, therefore, if the reputed owner should not be responsible to such claimants. — As to chattel interests in land, they are, clearly, not within the purview of the statute. — The register acts do not affect titles, passing by operation of law, as, to executors or administrators, in case of death, or to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by statute; there is no reason, therefore, why it may not be so transmitted in a particular case falling within the operation of the statute of *James*; and there never

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was one which came more completely within the spirit and very language of that act than the present, the deed containing all the expressions employed in the statute. In *Ex parte Matthews* (*a*) Lord *Hardwicke* says, "A mortgage may be made of a ship at sea; and if mortgagee takes all methods in his power to get the possession, such as bill of sale, &c., it will be out of the statute of *Jac.* 1., as was held in *Brown* v. *Heathcote*; which case was taken notice of n *Ryal* v. *Rowles*; otherwise no security could be made of a ship at sea." If indeed the ship continues at sea, the case does not seem to fall within the provisions of the statute, but if it returns, the statute immediately applies. *Ex parte Batson.* (*b*) In *Ex parte Yallop*, the Court did not give any decisive opinion against the doctrine contended for, and in *Mestair* v. *Gillespie* (*c*), the Master of the Rolls expressly recognizes it; *Robinson* v. *M'Donnel* (*d*) is expressly in point, and though now to be reconsidered, may be cited for the language and opinion of Lord *Ellenborough.*

Parke, in reply. *Robinson* v. *M'Donnel* and *Hay* v. *Fairbairn* (*e*) are now to be reconsidered by the Court, and the other authorities do not come up to the point of the present case. The clause of the deed which enables the bankrupt to retain the ship, does not and cannot enable him to hold himself out as reputed owner, for every one is able to inspect the register. If the ship had been let, and the lessee had become bankrupt, that would not have been conclusive on the true owner, and this case does not differ from the case of a lessee.

(*a*) 2 *Ves. sen.* 272.
(*b*) 3 *Bro. Ch. Ca.* 362.
(*c*) 11 *Ves. jun.* 645.
(*d*) *Selw. N. P.* 1142.
(*e*) 2 *B. & A.* 193.

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DALLAS C. J. The general question, here, is, whether the ship *Dolphin* was in the possession, order, and disposition of the bankrupt at the time of the bankruptcy, with the consent and permission of the true owner and proprietor; and two objections have been urged against the claim of the Defendants in error to this ship; one, that the reputed ownership should have been found by the jury, — that it has not been found, — nor have facts been found on which the Court could infer any such reputed ownership; — the other, that the possession of the bankrupt at the time of the bankruptcy could not constitute a reputed ownership under the statute of *James*, inasmuch as by the register acts no one can be reputed owner but he who is registered as such.

Upon the effect of possession by the bankrupt at the time of the bankruptcy, with respect to reputed ownership, the facts are such (here his Lordship stated the facts of the case) that it is impossible to conceive a stronger case of apparent ownership, continuing up to the time of the bankruptcy: but, independently of this, and as far as the conduct of the assignees could affect it, the property, here, would pass to them; for, at the period when the commission was sued out, the ship was on a voyage; and in every case of a transfer of a ship at sea, the assignee must do, not that which is impossible, (namely, possess himself of the ship at sea,) but what he can do, that is, assert his title at the earliest period when he can make it available by taking possession. This the Defendants in error did on the ship's return, and as soon as they were enabled to do so under the commission; and the question, therefore, comes to this, whether the register acts operate as a repeal of the statute of *James?* Now those acts were made with a view to very different objects. — The register acts relate only

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only to transactions between vendor and vendee; to cases of real ownership. The statute of *James* was passed to prevent tradesmen from being injured by false credit derived from apparent or reputed ownership: the case of apparent ownership is, by the very term, opposed to that of real ownership, and therefore cannot fall within the purview of the registry acts. The vessel, in the present case, is left in the possession of the bankrupt with the consent of the true owner and proprietor, and I agree with Lord *Ellenborough*, that "these statutes do not affect titles passing by operation of law, as, to executors or administrators in case of death, or, to assignees generally in case of bankruptcy. In these cases a title may be transmitted without any of the forms required by the statute; and if a title may be transmitted without these forms in cases of bankruptcy generally, we see no reason why it may not be so done in a particular case, falling within the scope and operation of the statute of *James*." (*a*) That is the true ground on which these cases are distinguishable; we are not now considering the case as between vendor and vendee, but as between an assignee by operation of law, and an owner who has permitted the bankrupt to retain the vessel in his order and disposition.

As to the other point, I will only say that sufficient facts appear on this record to refer to the Court the question of apparent ownership; and it appears to us that the conclusion to be drawn is, that the bankrupt was in possession with the consent of the true owner and proprietor. A reputed ownership in goods is established by the fact of the bankrupt's having the order and disposition of them with the consent of the true owner. Here, the bankrupt had such order and dis-

(*a*) Cited in *Hay* v. *Fairbairn*, 2 *B.* & *A.* 196.

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position of the ship; and we are, therefore, of opinion, that the judgment of the Court of King's Bench should be affirmed.

Judgment affirmed accordingly.

RICHARDSON J., who, while at the bar was of counsel in the cause in the court below, was absent.

REGULA GENERALIS.

(*Hilary* term, 60th *Geo.* III. and 1st *Geo.* IV.)

IT IS ORDERED by the Court, that from and after the last day of this present *Hilary* term, no motion shall be made at the bar on the last day of any term touching the amendment of any fine or recovery, or any of the proceedings therein.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

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Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Trinity Term

AND IN THE SUBSEQUENT VACATION,

In the First Year of the Reign of George IV.

George Evans Bruce and Andrew Batwell v. Thomas Bainbridge.

June 14.

HIS Honor the Vice Chancellor, by an order in this cause, dated 7th *March* last, ordered a case to be made for the opinion of the Judges of this Court. This

The devisor, by will, left all his "real and personal estates" to his brother; by a codicil reciting, that since the making of the will his brother had died, and that devisor, was possessed of a considerable fortune both real and personal, the devisor, after a devise to nephew *J.*, left all his estates, lands, and tenements in *H.*, *F*, and *M.*, to his nephew, *G. E.*, and other lands to nephews *L* and *C.*, respectively, none of them to come into possession till they were respectively of age; and if one or more of them should die before he or they came of age, the estate or estates of him or them so dying were then left to nephew *J.* and his issue lawfully begotten; and if *J.* should die without issue, to *G. E.*; and for default of such issue in *G. E.*, to *L.* and his issue; and in default of such issue in *L.*, to *C.* and his issue; and for default of such issue in *C.*, to nephew *S.* and his issue; and for default of such issue in *S*, to niece *K.* and her issue, in such manner, and under such restrictions and limitations as she should think proper to dispose of the same among her issue, it being the intent of the will to prevent waste by making the several children of *G. E.* tenants for life only. *Power* for nephews marrying to make reasonable settlements on their wives, and to dispose of their respective estates among the issue of such marriages, in manner as they should think proper to limit and appoint the same. The residue not disposed of was left to nephews and niece, except *S.*, to be divided among them, share and share alike, at their respective coming of age; and if any should die before that time, the share of the party dying to go to the survivors and survivor: Held, that *G. E.*, under this will and codicil, took an estate for life in the lands in *H.*

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case first set out the will of Dr. *Lewis Bruce* dated the 22nd *October*, 1788, and duly executed and attested to pass real property. The will, after some preliminary matter, proceeded thus:

"And as touching and concerning all the real and personal *estates* as well in *England* as *Ireland*, which I am seised, possessed of, or otherwise entitled to, either in possession, reversion or remainder, after payment of said debts and legacies, I give, devise and bequeath the same in manner following, that is to say, I give, devise and bequeath to my brother *George Bruce*, Esquire, of the city of *Cork*, all my real and personal estate in lands, tenements and hereditaments or otherwise, both in *England* and *Ireland*, to hold to him, his heirs and assigns, for ever, subject and chargeable with the payment of the aforesaid debts, and subject and chargeable also with the payment of the several annuities and legacies hereafter given, devised and bequeathed by this my will"—: and, towards the conclusion, contained the following clause: "All the rest, residue and remainder of all my real and personal estates, both in *England* and *Ireland*, not heretofore disposed of, I give, devise and bequeath unto my said brother *George Bruce*, Esquire, his heirs, executors, administrators and assigns for ever: and lastly I do hereby appoint my said brother *George Bruce*, Esquire, sole executor and residuary legatee to this my last will." By a codicil, dated 18th *February* 1779, also duly executed and attested, (which recited the will above referred to and the appointment of *George Bruce*, then lately deceased, residuary legatee and sole executor,) *Lewis Bruce* nominated and appointed his nephews *Jonathan* and *George Evans Bruce* executors of his will, in the room of their father deceased. The codicil then, after reciting that his brother deceased, by will, appointed him, *Lewis Bruce*, residuary legatee, proceeded thus: "And whereas I am seised and possessed of a considerable *fortune*, both real and personal, which by

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my will I did intend for my said brother deceased, except such parts thereof as are therein otherwise disposed of; now I do, by this codicil, will and dispose of the fortunes aforesaid in manner and form following:"— (after sundry legacies, and a devise of tithes and a term in lands in *Ireland*, to devisor's nephew *Jonathan Bruce*) — "To my nephew *George Evans Bruce* I devise, give and bequeath all my estates, lands, and tenements in *Hertfordshire*, *Finchley* and *Middlesex*, in *England*, which I am seised or possessed of in right of my late wife." Then after some further devises of *Irish* property to devisor's nephews *Lewis Bruce* and *Charles Bruce*, respectively, and legacies to other relations, and friends, the codicil proceeded thus: "And further it is my will, that my said nephews shall not be entitled to the actual seisin or possession of the several estates, bequests and annuities herein devised and bequeathed to them, until they shall respectively attain their several ages of 21 years; and, that the issues and profits thereof, over and above what shall be thought necessary for their respective maintenance and education, shall annually accumulate for their respective uses so soon as they shall attain the several ages aforesaid: and, if one or more of my said nephews shall happen to die before he or they shall attain his or their age or ages of 21 years as aforesaid, then, and in that case, I devise and bequeath the estate and estates of what nature or kind soever hereinbefore devised and bequeathed to him or them so dying, to my nephew *Jonathan* and his issue lawfully begotten: and, if the said *Jonathan* shall happen to die without issue, then I devise and bequeath the estates, which he shall derive or be entitled to under and by virtue of this my will, to his next brother *George Evans Bruce*; and, for default of such issue in the said *George*, then the estates of the said *Jonathan* and *George* to go to and vest in my nephew *Lewis* and his issue aforesaid; and, in default of such issue in the said *Lewis*, then the estates of the said

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Jonathan, George and *Lewis* to go to and vest in my nephew *Charles* and his issue as aforesaid; and, for default of such issue in the said *Charles*, then the estates severally herein devised and bequeathed to his brothers aforesaid to go to and vest in nephew *Saul* and his issue in like manner; and, for default of such issue in the said *Saul*, then the whole of the estates devised and bequeathed to her brothers as aforesaid to go to and vest in my niece *Catherine Bruce* and her issue, in such manner, and under such restrictions and limitations as she shall think proper to dispose of the same to and amongst her said issue; it being the intent and meaning of this my will to prevent waste by making the several children of my brother *George*, deceased, tenants for life only. And further, it is my will, that such of my said nephews as shall marry shall be authorised hereby to make reasonable settlements upon such wives as they and each of them shall take, and dispose of their respective estates to and among the issue of such marriages in such manner as they shall think proper to limit and appoint the same." After a pecuniary legacy to *Catherine Bruce*, the codicil then proceeded as follows: "All the rest and residue of my worldly substance, of what nature and kind soever or wheresoever not already disposed of by this my codicil or by my last will, to which this is annexed, I devise, give and bequeath to my nephews and niece aforesaid, except my nephew *Saul*, who is to take no part thereof, being amply provided for otherwise, to be divided among them, share and share alike, at their respective ages of 21 years; and, if one or more of them shall happen to die before he, she or they shall severally attain his, her or their respective age or ages of 21 years; then, I will and direct, that the share or shares of him or them so dying shall go to the survivors and survivor of them."

The question for the opinion of the Court was, "What estate did *George Evans Bruce* take under the will

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will and codicil of Dr. *Lewis Bruce* or either of them in an estate situate at *Totteridge*, in the county of *Herts*."

Lawes Serjt., (with whom was *Lens* Serjt.) for the Plaintiff. By the first devise in the codicil to the Plaintiff *Bruce* under the word *estates*, accompanied as it is there, he certainly would have taken a fee. *Holdfast, dem. Cooper*, v. *Marten* (*a*), *Fletcher* v. *Smiton* (*b*), *Roe, dem. Child*, v. *Wright* (*c*). If, however, it be contended that the words of the devise over to the other nephews are inconsistent with the grant of a fee to the Plaintiff, those words are at least sufficient to give him an estate tail; for the word *issue* in a will is equivalent to *heirs*. *King* v. *Melling* (*d*), a leading authority on these points, is, as reported in 2d *Levinz*, almost the same as the present case. The power given to the nephews to make settlements on their marriage does not narrow the construction, it being as necessary for a tenant in tail to have a power in order to enable him to make a settlement, as for a tenant for life. Besides, the estates of the nephews are, in case of their deaths, devised over to the niece; but a mere life estate could not be the subject of a devise over. The words, "it being the intent and meaning of this my will, to prevent waste, by making the several children of my brother tenants for life only," though in a certain degree expressive of intention, give no estate, and therefore can only operate as a condition; as such, they are void, and cannot control the intent before clearly expressed, to give the nephews an estate tail. To this effect is the rule as to intention laid down by *Fearne*. (*e*). As a question of intent, therefore, it is clear, from the whole codicil, that the devisor meant to give his nephews an estate tail, and such intent cannot

(*a*) 1 *T. R.* 411.
(*b*) 2 *T. R.* 656.
(*c*) 7 *East*, 259.
(*d*) 1 *Ventr.* 214. 225. 2 *Lev.* 58. 3 *Keb.* 42. 50. 95. *Poll*, 101.
(*e*) 6 Ed. 166. to 172.

 be

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be sacrificed to those latter words, which amount to no other than a condition inconsistent with the preceding grant. (*a*)

Bosanquet Serjt., (with whom was *Vaughan* Serjt.,) *contrà*. By the express words of the devisor, the Plaintiff takes only an estate for life. The particular intent must, it is said, be sacrificed to the general, where both cannot stand together; but, in the endeavour to preserve the general intent, at the expense of the particular, both of them have too frequently been sacrificed; and the Court will not carry the rule further than it has extended already. In *Pierson* v. *Vickers* (*b*) Lord *Ellenborough* says, "It is very doubtful in all these cases whether we do not act contrary to the real intention of the testator in giving more than a life estate to the first taker;" and *Willes* C. J. says (*c*), quoting *Reynolds* J., "Shall not a man be allowed to speak his own mind in a will? Surely a man ought to be allowed to do so: and yet, if we consider how miserably some wills have been tortured, we may fairly say that this is a privilege not always allowed to testators." It is true, that where the general intent cannot be effected without giving the devisee an estate tail, that construction must be put on a devise, *Langley* v. *Baldwin* (*d*); but that is not necessary here; and independent of the express words, it is clear the devisor meant the nephews only to have an estate for life. If they marry and have issue, that issue is not to inherit in the ordinary way, but to take distributively under the appointment of their parents: and yet it is contended, that one nephew may take an estate, suffer a recovery, and defeat this disposition to the future grand nephews. *Issue* may be applied as a word of purchase

(*a*) See *Fearne's Rem.* 256. 258. See also *Seale* v. *Barter*, 2 *B. & P.* 485. and *Doe, dem. Cole* v. *Goldsmith*, 7 *Taunt.* 209.

(*b*) 5 *East*, 548.

(*c*) In *Ginger* v. *White, Willes*, 351.

(*d*) In *Attorney-General* v. *Sutton*. 1. *P. Wms.* 59.

or

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or limitation, accordingly as the intent of the devisor may require. (*a*). The provision made for the grand nephews shews, that, with respect to them, it is used as a word of purchase, and the sense there affixed to it must govern the sense in which it is to be applied in the rest of the will. *Robinson* v. *Robinson* (*b*), *Hockley* v. *Mawbey* (*c*), and *Doe*, *dem. Wright*, v. *Jesson* (*d*), especially the latter, seem to rule the present case. In *Doe* v. *Jesson* the power in the parent to appoint among his children, was one of the reasons for holding that he had only an estate for life, notwithstanding the devise was to such *heirs of his body* as the parent should appoint. Upon the authority of that case, too, the same construction must be put by the Court upon the word *issue*, in the first part of this codicil, as has been put by the devisor himself in the latter part, and the children must take distributively as purchasers. A life estate, here, will also be consistent with the testator's general intent: for, though, in some cases, if the first taker have only an estate for life, the property may, in consequence of his having no larger estate, go over to a stranger to the exclusion of some of the blood of the first taker; yet, here, that inconvenience is avoided by the parent having a power to appoint a fee among his children. It is not necessary, here, to argue what could be the effect of the parent's omitting to appoint, or to enter into the distinction between powers and trusts; though, it is probable that, if the parent omitted to appoint, a Court of equity would consider him as a trustee, and appoint in his stead: *Brown* v. *Higgs*. (*e*)

Lawes in reply. The codicil no where enables the parent to appoint a fee among his children: he has only

(*a*) By *Wilmot* C.J., in *Roe* v. *Grew*, 2 *Wils*. 323.

(*b*) 1 *Burr*. 38.

(*c*) 1 *Ves. jun*. 143.

(*d*) 5 *M.* & *S*. 95.

(*e*) 4 *Ves. jun*. 708. 5 *Ves. jun*. 495.

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a bare power of appointment, without any mention of the quantity of estate to be appointed. The cases cited do not affect the terms of the present will, and *Doe* v. *Jesson* is clearly distinguishable; for, there, the devisee had only a life estate given him in the first instance.

Cur. adv. vult.

The following certificate was afterwards sent:

This case has been argued before us by counsel, we have considered it, and are of opinion, that the Plaintiff, *George Evans Bruce*, took an estate for his life only in the estate in question in this cause.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

(IN THE EXCHEQUER CHAMBER.)

June 17. (*a*)

HOME v. Lord F. C. BENTINCK.

The commander-in-chief of the army, having directed an assemblage of commissioned military officers to hold an enquiry into the conduct of *H.*, a commissioned officer in the army; and *H.* having sued the president of the enquiry for a libel stated to be contained in the report thereupon made: Held, that this report was a privileged communication; that it was properly rejected as evidence at the trial; and that an office copy of the same was also properly rejected.

THE Plaintiff declared against the Defendant for a libel. The declaration, which consisted of several counts, setting forth various parts of the libel, with the pub-

(*a*) The case of *Monkhouse* v. *Hay*, (*ante*, 114.) the date of which is accidentally omitted, was decided on this day.

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publication of which the Defendant was charged, stated in the first count, by way of inducement, that before and at the time of the commission of the offence charged, the Plaintiff was a lieutenant-colonel in his majesty's army, that he had been engaged in a certain mining adventure, carried on under the firm of *Salisbury* and Co., and that in the Court of Chancery, an injunction had been obtained, restraining the Plaintiff from accepting or indorsing bills in the name of the persons trading as aforesaid; that he had never been guilty or suspected to have been guilty of unfair, dishonest, or improper conduct in the partnership concern; or of any wilful or fraudulent secreting or withdrawing himself from the service of any process of the Court of Chancery, or of any other improper conduct, but, on the contrary, had always hitherto conducted himself in a fair and honest manner in his transactions with his partners, and in all other transactions, and in every respect in a manner worthy of his character and situation as a gentleman and an officer in his majesty's service.

The last count of the declaration (in which the whole of the libel charged was set out) stated, that whereas the Defendant was appointed with six other persons by his royal highness the Duke of *York*, commander-in-chief of his majesty's forces by land, to enquire into the conduct of the Plaintiff in the mining adventure, in the first count of the declaration mentioned: and whereas the Defendant was appointed to preside at the deliberations of the said persons, and to report to the said Duke, the opinion of the said persons touching the conduct of the Plaintiff in the said mining adventure; and although it was the duty of the Defendant to report truly the opinions of the said persons, yet the Defendant well knowing, &c. but wrongfully intending to injure the Plaintiff, and to deprive him of the countenance and good opinion

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of the Duke of *York*, falsely and injuriously suggested and represented to the Duke of *York*, that the said persons so appointed as aforesaid, had unanimously agreed in certain opinions, there following, of and concerning the Plaintiff as such officer, and his conduct in the mining adventure, viz. "1st. That Lieutenant-colonel *Home* became a partner in the firm of *Salisbury* and Co. 2d. That Lieutenant-colonel *Home*, as appears in his letter marked No. 3., expressed himself perfectly satisfied with and gave his consent to any arrangement that might be made by the managing partner of that concern. 3d. That, notwithstanding an agreement entered into by the co-partners, viz. that no one but the managing partner should draw or indorse bills, Lieutenant-colonel *Home's* brother, *David Home*, did draw bills to a larger amount than the sum vested by Lieutenant-colonel *Home* in the said concern, which bills were accepted by Lieutenant-colonel *Home*, on the firm of *Salisbury* and Co. It is necessary here to observe, that Lieutenant-colonel *Home* declares his ignorance of the articles of agreement, which he affirms he never saw; and, moreover, that, in those articles restricting any but the managing partner from drawing or indorsing bills, the word accept does not appear. The other partners, however, maintain that it was understood by them, that they were equally restricted from accepting bills. The court think themselves further called upon to observe, that Lord *Ellenborough* in his charge to the jury, in an action in which Lieutenant-colonel *Home* was Defendant, considers the bills drawn by *David Home*, in the same light as if drawn by his brother Lieutenant-colonel *Home*. 4th. That Lieutenant-colonel *Home* took measures to avoid receiving personally the Lord Chancellor's injunction, restricting him from drawing, accepting, and indorsing bills on the firm of *Salisbury*

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and Co.: and, in the steps taken by him to avoid the Lord Chancellor's injunction, as well as what subsequently took place between himself and Quarter-master *Weston*, the conduct of Lieutenant-colonel *Home* does not appear to have been actuated by those high and delicate feelings of honour, which in all transactions of life ought to influence an officer of his high rank and reputation." Whereas, in truth and in fact the said persons so appointed as aforesaid, at the time of the Defendant's making the said representation to the Duke of *York* did not, nor did they at any other time, unanimously agree in the said opinion; by reason whereof the Plaintiff was greatly injured, &c., and also by reason whereof his Royal Highness *George* Prince of *Wales*, Regent of the united kingdom, &c., acting in the name and on the behalf of his majesty, did deprive the Plaintiff of his rank of lieutenant-colonel, in the service of his majesty, and did also deprive him of his commission of captain in his majesty's third regiment of foot guards, &c. &c. (*a*). Plea not guilty.

At the trial before *Abbott* C. J. (*Guildhall* sittings before *Michaelmas* term 1819,) Sir *Henry Torrens* proved that the Plaintiff was, at the time of the transactions in question, lieutenant-colonel in the army, and captain in the third regiment of foot guards; the Defendant a major-general, and at the time of such transaction colonel in the army: that the witness was military secretary to his Royal Highness the Duke of *York*, commander-in-chief of his majesty's forces; that the witness, as such military secretary, was in possession of the minutes of a court of inquiry held by the directions of the commander-in-chief, of which the Defendant was the president; that the court of inquiry consisted of several

(*a*) Loss of the society of friends, &c. was also alleged.

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other military officers as well as the defendant, and, that the inquiry was directed by the commander-in-chief to be made by such court upon the conduct of the plaintiff; that the minutes, so in possession of the witness, were the minutes of the proceedings, evidence, and judgment of the said court of inquiry, and were delivered by the Defendant, as president of the said court, personally to the commander-in-chief, as the report of the said court upon that inquiry; and, that the commander-in-chief deposited these minutes in the office of the commander-in-chief, and the same, by being so deposited, became and were under the care and in the custody of the said Sir *Henry Torrens*, as such military secretary. The counsel for the Defendant then insisted, that the said minutes could not be admitted and allowed to be read in evidence; and the counsel for the Plaintiff insisted that such minutes ought to be admitted and allowed to be read in evidence for the Plaintiff. *Abbott* C. J. thereupon delivered his opinion, that the said minutes ought not to be read in evidence. The counsel for the Plaintiff then tendered a copy of the said minutes in evidence for the Plaintiff, delivered from the office of the commander-in-chief; but *Abbott* C. J. delivered his opinion, that such copy ought not to be read in evidence; and under his direction the jury found a verdict for the Defendant. The counsel for the Plaintiff, thereupon, tendered to the Chief Justice a bill of exceptions, containing the several matters so offered in evidence, whereunto his lordship set his seal, according to the statute. Judgment having passed for the Defendant below, the Plaintiff below assigned errors; and, the Defendant below having joined in error, the case now came on to be argued.

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Evans, Joshua, for the Plaintiff, in error. The matter set forth in the declaration is clearly libellous, *Bell* v. *Stone* (a), *Thorley* v. Lord *Kerry* (b); and, at all events, when followed by the consequences there stated, is clearly actionable, *Moore* v. *Meagher*. (c) If, however, the Court should reject the only evidence which can prove the existence of this libel, such rejection will, in fact, be a decision that the libel in question is one for which the party libelled can bring no action; one, which the party publishing is privileged to publish. Now the only cases in which a person may speak or write to the discredit of another, and on which the person so injured cannot bring an action, are the cases of judges and jurors, *Sutton* v. *Johnstone* (d), *Jekyll* v. Sir *J. Moore* (e), witnesses, and parties speaking in courts of justice: but any further argument upon this class of cases is unnecessary, if, as will be clearly shewn, the court of inquiry was not a legal court. It has been holden, too, that counsel may justify the use of defamatory expressions, but with this restriction, that they must be suggested, and pertinent, *Brook* v. *Montague* (f). So a master will not be liable in damages for speaking ill of a servant whose character he is requested to give, provided such master can clearly shew that he has spoken conscientiously and without malice. But, in these cases, the Plaintiff is always allowed to shew malice, if he can, *Rogers* v. *Clifton* (g), *Rex* v. *Waring* (h). The Defendant was neither master nor counsel to the Plaintiff; and the cases cited prove how careful the law is

(a) 1 *Bos. & Pul.* 331.
(b) 4 *Taunt.* 355.
(c) 1 *Taunt.* 39.
(d) 1 *T. R.* 503.
(e) 2 *N. R.* 341.
(f) *Cro. Jac.* 90.
(g) 3 *Bos. & Pull.* 587.
(h) 5 *Esp.* 13.

to

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to prevent unnecessary injury being done to the characters of individuals. There are also certain cases of confidential communication, in which it has been holden, that a person *bonâ fide* advising his friend not to trust a third person, is not liable to an action, *Herver* v. *Dowson* (a), *Vanspike* v. *Cleyson* (b), *M'Dougall* v. *Claridge* (c), *Cleaver* v. *Sarraude* (c), *Dunman* v. *Bigg* (d), *Barbaud* v. *Hookham* (e).

But, in all cases of confidential communication, it is essentially necessary that the person making an enquiry should be directly interested in the object of the enquiry, and that the person communicating should communicate only the result of his own knowledge, and to the person interested; neither can information be given affecting the character of the party, in any point save that about which the person enquiring is interested; and, when the question has been as to the solvency of a trader, the skill or honesty of an attorney or steward, the person communicating has never been permitted to defame the character of the party, by stating matter totally irrelevant, as, that he was a bigamist. If a man giving advice, calls another a thief, it is not necessary to leave it to the jury, whether such language is a confidential communication (*f*). The libel, of which the Plaintiff complains, has no one quality of a confidential communication; it is written by persons no way interested; it is written to the commander-in-chief, but does not contain one word as to the Plaintiff's military conduct; it makes no complaint of the Plaintiff's conduct with respect to the Defendant. It is not the result of

(a) *Bull. N.P.* 8.
(b) *Cro. Eliz.* 541.
(c) 1 *Campb.* 267.
(d) *Id.* 269.
(e) 5 *Esp.* 109.
(*f*) 1 *Brod. & Bing.* 8., *per Richardson* J., in *Godson* v. *Home*.

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of the Defendant's own knowledge, but of a public examination of persons in the presence of numerous spectators. The libel is not a statement of facts, it is a direct censure of the Plaintiff's conduct and character. "If a felony be committed, it is a good cause to arrest one for felony, but not to speak words to defame one." *Scarlett* v. *Stile* (*a*). If the Defendant, in *Barbaud* v. *Hookham*, instead of acting on his own knowledge, had enquired from different persons what they knew to the disadvantage of the Plaintiff, and, in consequence of defamatory stories told by such persons, had made the report to the committee, there can be no doubt that such conduct would have furnished sufficient evidence of malice, and would have deprived him of all protection which he derived from his confidential communication. In *Brown* v. *Croome* (*b*), Lord *Ellenborough* held, that an advertisement in a public paper, strongly reflecting upon the character of an individual who had been declared bankrupt, was libellous; though published with the avowed intention of convening a meeting of creditors for the purpose of consulting upon the means proper to be adopted for their own security, if the legal object might have been attained by means less injurious. If a person, instead of privately enquiring whether his servant or tradesman is trustworthy, an attorney intelligent, or the like, were, by himself or deputy, to summon the servant's, trader's, or attorney's friends and enemies, and examine them, not only on those matters, but on the domestic conduct of the parties, it cannot be doubted that such a mode of enquiry would be illegal and actionable: in such a course, there is none of the confidence, none of the secrecy, always required, when the characters of individuals are in question, but

(*a*) 1 *Brownl.* 2. (*b*) 2 *Starkie*, N.P.C. 297.

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a court of justice is erected, at once dangerous and illegal. The libel in question, then, cannot be considered as a confidential communication made by individuals: the facts that the libel of which the Plaintiff complains was the production, not of one person deputed to make enquiries, but of several, and that they made those enquiries, not secretly and confidentially, but assuming to be a court of justice, are sufficient to prove it not a confidential communication. Unless the assemblage of officers can be supported as a legal court, or as a legal commission, the Defendant can only be considered as an individual, and must plead the truth of the libel, if he can, in justification; the mockery of a court of justice, instead of palliating, must aggravate his offence, if what he has published be false and malicious. Nor can he be justified in consequence of any authority which he may have received from the commander-in-chief. High as that commander is in rank and situation in this kingdom, he is but a subject, and cannot claim any privileges as commander-in-chief, to which the meanest subject in the land, if appointed to the office, would not be entitled. If the commander-in-chief has the power, every person in the employment of government has the power of directing what enquiry he may choose into the conduct of any persons holding any place or office at the will of the sovereign; and, if the persons directed to inquire are protected in whatever calumnies they may falsely and maliciously state, no slavery that ever existed would be comparable to it; for there is scarcely any person of the rank of a gentleman in this country, who, in some way or other, may not hold a situation at the will of the sovereign. The Lord Chancellor, all Privy Councillors, the Attorney and Solicitor General, all justices of the peace, all officers in the customs and excise, all officers in the army and navy, all bar-

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risters, all attornies would be subject to such enquiry: but it never can be argued, that any department of his majesty's government may direct enquiries to be made into the public or private conduct of an individual, and may authorise the writing of false and malicious libels against him. It is unnecessary to cite authorities or adduce arguments to prove that no subject of this realm can appoint a commission or erect a court, without authority either from the sovereign or the legislature. If the defendant and the other officers had any such authority to sit as a court of justice, it was incumbent upon him to have shewn it: he did not and could not do so. To give the Defendant every advantage in the argument, let us, however, go the length of presuming that the Defendant and other officers were commanded even by his majesty himself (although such was not the case) to enquire and give an opinion on the Plaintiff's character and conduct; it will now be proved that the sovereign himself could not legally erect such a tribunal. If their authority was derived from that high source, they must have constituted either a court or a commission; there is no other expression that can be used for the purpose of describing them; the following description of courts of enquiry is given by a writer on military tribunals (*a*): "A Court of Inquiry is of a very delicate nature; a number of officers are assembled to inquire into an officer's supposed misbehaviour, and I have known them ordered to give their opinions in writing to the person who ordered them to assemble, that he may judge from their determination, if there is sufficient matter to bring him to a general court-martial. There is no article of war for this kind of proceeding, and though it has frequently been complained of, because the members are not sworn, and that its opinions may

(*a*) *Syme's Mil. Dict. sub voc. Court.*

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influence a general court-martial, yet reason has hitherto been unsuccessful in its endeavours to abolish this unequitable custom of the army." In all military writers it is stated, that the members of a court of enquiry are not sworn, nor do the witnesses give their evidence on oath, neither can any person be legally obliged to furnish information or give his testimony. The method of proceeding, and the constitution of courts of inquiry, are in direct contradiction to the course of proceeding by the common law of the land. The prerogative of the sovereign in erecting courts of justice, is thus laid down in *Comyn's Digest* (a), "The king, by his prerogative, may make what courts for the administration of the common law, and in what places he pleases, but the king cannot erect a court of chancery or conscience, nor grant to a court that it may proceed by civil law: nor can he by charter, or commission, alter the common law. So, the erection of a new court with a new jurisdiction cannot be without act of parliament." These authorities are decisive, that the sovereign himself could not erect such a court of enquiry, which, in point of fact, has no resemblance to a court of justice except the name.' The judges are not on oath, and no judgment can be given. Suppose it then, to be a commission to enquire? In 12 *Co.* p. 31. it is said, "Note, commissions in English under the great seal were directed to divers commissioners, within the counties of *Bedford*, *Bucks*, *Huntingdon*, &c. to enquire of divers articles annexed to it, to enquire of depopulation of houses, &c.; but the commissioners should not have any power to hear and determine the said offences, but only to enquire of them: and by colour of the said commissions the said commissioners took many presentments in English, and did return them into chancery,

(a) Tit. *Prerogative*, D. 28.

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and, after, it was resolved (by nine judges,) that the said commissions were against law, (for these reasons, among others, viz.) that it was only to enquire, which is against law, for by this a man may be unjustly accused, and he shall not have any remedy. Also, the party may be defamed, and shall not have any traverse to it. Such a commission may be only to enquire of treason, felony committed, &c. and no such commission ever was seen to enquire only, *i. e.* of crimes." This case shows conclusively that by the common law a commission to enquire, without a power to determine, was always illegal: but the illegality of such commissions does not rest merely on that decision; the same doctrine is laid down in 2 *Inst.* 163. 2 *Hale* 21. *s.* 5. In *Rot. Parl.* 15. *Ed.* 3. (*a*) it is prayed, that divers commissions of enquiry by the chancellor, treasurer, and other great officers be repealed, for that it is not lawful to grant them without assent of parliament. By 42 *Ed.* 3. *c.* 3. confirmed by 16 *Car.* 1. *c.* 10. it is enacted, "that no man be put to answer without presentment before justices, or matter of record, or by due process, and writ original, according to the old law of the land, and if any thing from henceforth be done to the contrary it shall be void in the law and holden for error." By 1 *W.* & *M.* (*b*) it is enacted, "that the commission for erecting the late court of commission for ecclesiastical causes, and all other commissions and courts of like nature, were illegal and pernicious." As a standing army is merely the creature of the mutiny act, there can be no immemorial custom belonging to the army; but, supposing that these courts of enquiry had custom to support them, yet such custom would be illegal, as contrary to the authorities cited. In *Tredymmock* v *Perryman* (*c*) a custom to try causes by six jurors was held

(*a*) 2 *Roll's Abr.* 164. *Pl.* 14.

(*b*) *c.* 2. *s.* 2.

(*c*) *Cro. Car.* 259.

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illegal, though such custom had existed beyond the time of legal memory, and many judgments had been given on verdicts so found; and in *Leach* v. *Money* (*a*) it was held, that even antiquity itself could not sanctify a usage which was fundamentally bad. Therefore, unless the mutiny act makes a distinction as to the military, let the Defendant and the other officers call their meeting a court or commission, or whatever the Defendant pleases, it was illegal, even although it had been called together by the sovereign himself: but, if there be any class of his majesty's subjects which is by law particularly protected from such an inqusition it would appear to be the army. The preamble of the mutiny-act (*b*) runs thus, "And whereas no man can be forejudged of life or limb, or subjected, in time of peace, to any kind of punishment within this realm by martial law, or in any other manner, than by the judgment of his peers, and according to the known and established laws of this realm; yet nevertheless, it being requisite for the retaining of all the before-mentioned forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny, or stir up sedition, or shall desert his majesty's service, be brought to a more exemplary and speedy punishment than the usual forms of the law will allow, be it therefore enacted," &c.; the act then proceeds to designate the punishment for the several offences, authorises his majesty to grant commissions for holding courts-martial (*c*), enacts how courts martial are to be formed (*d*); and directs that officers on courts martial shall be sworn (*e*). By *s.* 35. it is enacted, "That it shall and may be lawful to and for his majesty to form, make, and establish articles of war for the better govern-

(*a*) 1 *W. Bl.* 555.
(*b*) 1 *Geo.* 4. *c.* 19.
(*c*) *s.* 14.
(*d*) *s.* 20.
(*e*) *s.* 28, 29.

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ment of his majesty's forces, which articles shall be judicially taken notice of by all judges and in all courts whatsoever." By *s.* 37. it is further enacted, "That for bringing offenders against such articles of war to justice, it shall be lawful for his majesty to erect and constitute courts-martial." By *Art.* 30. *s.* 16. "Whatsoever commissioned officer shall be convicted before a general court-martial, of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from our service; provided, however, that in every charge preferred against an officer, for such scandalous and unbecoming behaviour, the fact or facts whereon the same is grounded shall be clearly specified." By *Art.* 2. *s.* 24. "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not specified in the said rules and articles, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and to be punished at their discretion." The mutiny-act, then, is an authority for every position before stated. The preamble acknowledges that no person can be legally tried except by his peers, and according to the common law of the land; it allows that military persons would be in the same situation but for its enactments; but it does not enact, that they may be tried by persons not sworn, on the evidences of persons not sworn, or that the accused shall not have the power of summoning witnesses; it enacts the reverse of all this. It certainly gives the sovereign almost boundless power as to framing articles for the government of the army: the sovereign may make any thing an offence, but he cannot appoint such a tribunal as a court of enquiry to try the offenders: the statute expressly enacts, that the trial shall be by

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courts-martial; on what ground then can it be contended that an officer can be tried by any other court than an ordinary court of justice, or the particular court appointed by the mutiny-act? Mr. Justice *Powell*, in the seven bishops' case, says (*a*), "I think there is no danger to the government at all in requiring good proof against offenders." In *Grant* v. *Gould* (*b*) it is said, that it is not to be disputed, that martial law can only be exercised in this country as far as it is authorized by the mutiny-act, and the articles of war. In *Johnstone* v. *Sutton* (*c*) the two Chief Justices state, if a man be charged with an offence against the articles of war, or, when the articles are silent, against the usage of the navy, his guilt or innocence can only be tried by a court-martial. If it were true that the sovereign had a right to dismiss an officer without assigning any reason, or having any reason, yet, the authorities cited, show that he would not have a right to appoint such a court of enquiry. It is absurd to state that the infliction of this court of inquiry on the Plaintiff is an act not of punishment but of mercy, when the severest punishment allowed by the articles of war and the mutiny-act is cashiering, except in two or three instances when loss of life is the punishment. In *Comyn's Digest* it is said, "The king's perogative cannot be exercised but for the benefit of the subject (*d*)." But what can be more injurious to individuals or the nation, than without a sufficient cause to dismiss an officer from the army or navy, and what cause, sufficient to justify such dismissal, could not be tried by a court-martial? In *Oliver* v. Lord *W. Bentinck* (*e*), Sir *James Mansfield* says, "The libel is in fact a recital of the effect of the authority under which the Defendant acts, and it would be a

(*a*) 4 *Sta Tri.* 341.
(*b*) 2 *H. Bl.* 95.
(*c*) 1 *T. R.* 549.
(*d*) *Com. Dig Prerog.* D. 28.
(*e*) 3 *Taunt.* 459.

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monstrous thing if the court of directors were to dismiss an officer without assigning a reason." It may be urged that this is the first action of the kind, but this is the first case in which a court of enquiry has afforded an opportunity. In all the military writers a court of enquiry is likened to a grand jury, and it is stated, that it is, at the utmost, its duty to find whether there are grounds for a court-martial or not; in this case, the Defendant and other officers passed a judgment. The libel in question could not be justified as the act of ordinary individuals, unless by averring the truth of the slander, and proving it, and in such a case the Plaintiff would have been allowed to show the falsehood and malice of the charges. Having proved, then, that this court of enquiry could not be appointed by any subject, however high his rank; and having shown that the sovereign himself could not constitute such a court or commission, and, therefore, that no person acting under it could derive any protection from it; (indeed it might have been asserted that any person advising his majesty to constitute such a tribunal would be guilty of a highly aggravated misdemeanour, and that the persons acting under it, although not guilty to the same extent, would be highly culpable for lending themselves to such an illegal act;) the Plaintiff has proved that the Lord C. J. of the *King's Bench* was not justified in refusing to allow the reading of the minutes of the court of enquiry: if the appointment of the court was illegal, the report is like any other libel written by an individual, and the party in whose possession it is, is bound to produce it. But, supposing the argument to be erroneous, and that the court called a court of enquiry was a legal court, or a legal commission, or its resolutions a legal confidential communication, still it would be impossible to support the learned judge's refusal of the evidence. If the resolutions can be con-

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sidered a private confidential communication, the Defendant cannot show a single instance in which the paper containing such confidential communication has been refused to be received in evidence; if a communication be false and malicious, the covering it with the semblance of a confidential communication would not protect the writer from an action. If the court of enquiry can be considered as a legal court, or a legal commission, there can be no doubt but the original proceedings, or a copy, must be admitted in evidence; the only exception is, that of an indictment for felony when the party accused is acquitted: in the case of misdemeanours the party is entitied to a copy of right; and even in case of felony, although it is ordered that no copy be given without a Judge's or the Attorney General's order, yet if a copy or the original be produced, it must be received in evidence (a): in the present case, the Plaintiff was prepared with the original and a copy, but the Chief Justice refused to allow either to be given in evidence. In the case of courts-martial, the mutiny-act enacts, that a copy of the proceedings shall be furnished. As it was at the trial, it will probably, now, be contended, that the libel, as being a confidential communication to one of his majesty's superior officers respecting another officer of his majesty, was privileged. It can scarcely be seriously contended, that a person may write a false and malicious libel of an officer in his majesty's service, and that such officer can have no redress. It can make no difference that he was required to make inquiries by a superior officer; if that officer were a party to the falsehood and malice, it would make it a conspiracy, if he was not, the writer would not be less guilty. In the case of the seven bishops (b) the clerk of the privy council was compelled to state what passed in the council-chamber, nay, what

(a) *Legatt* v. *Tollervey*, 14 *East*, 302.

(b) 4 *Sta. Tri.* 342.

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was said by the king himself, although the counsel for the crown resisted it most strenuously. The same evidence was also allowed to be given in Lord *Strafford's* case (*a*). Notwithstanding the oath administered to the collector of the property-tax, by the commissioners, that he will not disclose any thing he hears in that capacity, except by their command, or by virtue of an act of parliament, he is bound, when subpœnaed as a witness, to give evidence of all facts within his knowledge touching the matter in question, *Lee* v. *Birrell* (*b*). In *Robinson* v. *May* (*c*), Lord *Ellenborough* and the Court of King's Bench held, that though it may be the duty of all persons to give information to his majesty's proper officers concerning abuses, yet, if one write of another in a letter to such officer, that he is doing something to the prejudice of his majesty's service, which is not true, this is sufficient evidence of malicious intention; and when no defence is set up by the Defendant, the jury may well find him guilty, though there be no other publication, and no further proof of malice. What is a malicious publication, it is for the jury to determine. It seems impossible to distinguish the case now before the court from that of *Robinson* v. *May*; that case conclusively proves, that if a communication to government be false and malicious, it may be the subject of an indictment or of an action. Whatever means the party may use to get possession of such a document, or of an authentic copy, can make no difference in the case; it must be received in evidence. *Attorney-General* v. *Le Marchant* (*d*), *Rex* v. *Archer* (*e*). At the trial of the present cause, the Attorney-General said, the objection made by him was

(*a*) 1 *Sta. Tri.* 727.
(*b*) 3 *Campb.* 337.
(*c*) 2 *Smith*, 3.
(*d*) 2 *T. R.* 201.
(*e*) 2 *T. R.* 203.

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not new, and he referred to the case of *Cook* v. *Maxwell*, which he read from a short-hand note, stating that Governor *Maxwell*, the Defendant, had given particular orders to one of his officers, which orders were called for by the Plaintiff; but it was determined by *Bayley* J. that they were a privileged communication to that officer, and that as a privileged communication, they ought not and should not be produced. But in the printed report of *Cooke* v. *Maxwell* (*a*), *Bayley* J. says, "the law will not work injustice; if the document cannot on principles of public policy be read in evidence, the effect will be the same as if it was not in existence, and you may prove, not the contents of the instrument, but that what was done was done by the order of the Defendant." In another short-hand writer's notes of the same trial (*b*), in addition to what the printed report contains, *Bayley* J. is made to say, "Indeed, in this case, I do not know that, that which was issued by Governor *Maxwell*, was at all within the scope of any authority he had derived from and in virtue of his situation as governor." It thus appears how inaccurate the report cited by the Attorney-General was; *Bayley* J. does not decide that the evidence was inadmissible, but would have compelled the production of it, if no other evidence could have been had; and it is a case expressly in point, to show, that if any imperious rule of law prevented the production of the original, the Plaintiff was entitled to give secondary evidence. It has been argued, that it was necessary for the interest of the army and of the public, that these enquiries should be made, and that it would be against the public interest to allow the production of the report: necessity is always a suspicious argument, and never wanting to support the worst of

(*a*) 2 *Starkie*, N.P.C. 183. (*b*) *Dowling's* MSS.

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measures. It is clear, that by law these courts of enquiry are not allowed; but suppose, for one moment, that necessity could make such courts lawful, what is the necessity? By a court-martial, every offence, however minute, may be enquired into. It can never be argued, that martial law is too mild, and gives too little power to the sovereign. Such at least is not *Blackstone*'s opinion on this subject (*a*). For what purpose, then, can this power be so eagerly sought? If any other man commit an offence, the courts of his majesty are open for the investigation, and if he be guilty, will punish him; if an officer in the army commit an offence, in addition, a court-martial is provided. These courts of enquiry can only be so anxiously defended for the purpose of destroying the innocent and protecting the guilty. To quote the words of a military writer (*b*), "The paradox of a guilty man without fault is not more inadmissible in law than irreconcileable with experience; military law recognizing even all disorders and neglects which officers and soldiers may be guilty of, though not specified in the articles of war." It has now been shown, that the report of the Defendant and the officers cannot be considered as a confidential communication by individuals; that, if it could be so considered, yet the Plaintiff ought to have been allowed to give evidence to show that it was false and malicious; that the only difference between officers of the army and other persons, is caused by the mutiny-act; that, by that act, courts-martial are appointed for the trial of military men; that the sovereign himself cannot create such a court as a court of enquiry, it being illegal both by the common and statute law; that, if it be illegally constituted, its proceed-

(*a*) 1 *Bl. Com.* 416. (*b*) *William's' Mil. Law*, 148.

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ings ought to have been admitted when produced; that, if it could for a moment be considered as a court or commission, the Plaintiff was entitled to the minutes and evidence; and that the sovereign is vested with sufficient power for the government of the army. But, if that were not the case, and if more power be necessary, that is the province of the legislature, not of the court. Therefore, until the legislature shall have authorized the exclusion of such evidence as the Plaintiff has tendered in this case, he trusts that the Court will consider it ought to be admitted.

Littledale for the Defendant. Upon the trial of this cause, certain documents were offered in evidence, and the admissibility of those documents is the only question for the consideration of the Court. A court of enquiry was directed by the commander-in-chief; the defendant was the president of that court of enquiry; and these documents formed the report of that court of enquiry, which was made to the commander-in-chief, in consequence of the directions which he had given for the holding this Court. Under such circumstances, the minutes forming the report are of that nature, that they ought not to be received as evidence: they are confidential communications; and ought not for the safety and security of the state to be read without the direction of his majesty. By the common law, the king has, by his prerogative, the command of the army: his powers are restrained by the mutiny-act, which recites, "that a standing army in time of peace, unless it be with the consent of parliament, is against law:" but still, when there is an army in time of war or peace, the king is the supreme commander of it; and though he have not absolute control over the lives and limbs of the persons who compose it; though he may be restrained as to the mode in which

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he shall exercise his government over the army, yet, where the mutiny-act is silent, and proceedings appear necessary for the due discipline of the army, the king has a right to direct what he thinks proper. This is no more than the exercise of other prerogatives in the affairs of state, in all matters relating to affairs abroad and at home. It is not necessary to point out all the inconveniences which might arise, if all the reports made to government were to be made the subject of public discussion, and to be the subject of observation in all public prints in this country. It is the policy of the law, that all these communications should be kept secret.

The king, then, though restrained in a certain degree from exercising that full control, which a despotic commander would have in a foreign country by the mutiny-act, has the direction of issuing such orders as he pleases, for the better discipline and regulation of the army, provided they be not contrary to the mutiny act or the common law. All licentiousness in the conduct of officers he may enquire into, for the commissions of all officers are held at the pleasure of the crown (*a*); and though, in many cases, for the punishment

(*a*) *Arthur Herbert*, Earl of *Torrington*, admiral and commander-in-chief in the reign of king *William* 3., was tried at a court-martial, held on board the *Kent* at *Sheerness*, in *December*, 1690, in pursuance of a commission from the lords of the admiralty, upon the following heavy charge, founded upon the report of commissioners previously appointed to enquire into his conduct; viz. his having, "in the engagement with the *French* off *Beachey-Head*, (30th *June*, 1690,) through treachery, or cowardice, misbehaved in his office, drawn dishonour on the *English* nation, and sacrificed our good allies the *Dutch*;" and, notwithstanding the court unanimously acquitted his lordship of any imputation whatever from his conduct on that occasion, his commission was suspended, and he never was afterwards employed.

In *July*, 1702, Sir *John Munden*, rear-admiral of the Red, was tried by a court-martial, in pursuance of a commission from Prince *George* of *Denmark*, Lord high-admiral, upon several charges exhibited

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nishment of offences against the discipline of the army, the mutiny-act has provided courts-martial to be held, the king, by his prerogative, has a right of appointing what is called a court of enquiry. These courts of enquiry have been held as long ago as any memory goes back; though the earliest instance recorded, it is apprehended, is that which was directed upon the expedition to the coast of *France*, in 1756; where the crown, in 1757, directed an enquiry into the reason of the failure of that expedition (*a*). It was the constant practice in the course of the last war to hold these courts of enquiry. After the landing in *Portugal*, there was an enquiry, and no court-martial, and so in other instances. How is the prerogative of the crown to be known but by the exercise of that prerogative? These are not cases which can be cited from books; but the practice has been invariable. The object of courts of enquiry is not to punish the parties, but to direct certain officers who are named in the commission to make enquiry as to particular circumstances; and, then, upon the result of their enquiry being laid before his majesty, he directs, by the commander-in-chief, whether he thinks it right to have a court-martial or not. The court of enquiry resembles a grand jury. A man is not put to answer criminally unless there be a bill found, or an information filed in the King's Bench, or in particular cases as to

exhibited against him of miscarriage and neglect, in intercepting a squadron of *French* ships, which were to sail from the *Groyne* to the *Spanish West Indies*. The court, having examined the several articles of charges, gave their opinion, that the rear-admiral had fully cleared himself from the whole matter contained in them, and, as far as appeared to the court, had complied with his instructions, and behaved himself with great zeal and diligence. Notwithstanding this acquittal, Queen *Anne* ordered him to be dismissed from his post and command in the royal navy. *M'Arthur on Courts Martial*, vol. 1. pp. 109. 111.

(*a*) Sir *John Mordaunt*'s case, *M'Arthur on Courts Martial*, vol. 1. p. 112. 4th ed.

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high roads, where a presentment is made by a magistrate; and, therefore, the principle is, that no man shall be put on his trial without previous enquiry being issued, to put his conduct in a due course of investigation. If, then, it be a prerogative of the crown to issue a commission to hold a court of enquiry, the communications made to the crown ought to be protected and kept secret by analogy to the proceedings of a grand jury. Persons composing a grand jury are sworn to secrecy: it does not appear that persons composing a court of enquiry are so sworn; but, still, the two tribunals so far resemble each other, as to prevent the proceedings of either from becoming the subject of discussion. But the broader and better ground is, that it is in the nature of all communications whatever, which are required by the crown from its officers, as to any matters which concern the state in any way whatever. Suppose the crown were to direct the secretary of state for foreign affairs to send to enquire into the state of a garrison abroad, and the commanding officer were to make a report in consequence, which reflected on the conduct of some of the officers, would there be any pretence for saying, that, if an officer felt aggrieved by it, and no further steps were taken upon it, he could compel the production of that report? That report might not only relate to this officer, but to a great many other things, which it would be most injurious to the public service to disclose: it might relate to improper conduct in the garrison on the part of several persons: it might relate to the communications which they were having with the enemy: it might contain a communication from the enemy, on which it would be highly advantageous to act: and yet, according to the doctrine contended for, the whole report must be received, if one officer was aggrieved. So, if the lords of the admiralty were to direct enquiry as to the state of a ship; if the officers were aggrieved, the

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the whole report would not allowed to be read. If the conduct of the Plaintiff had been the subject of enquiry not by the crown, but by the House of Lords, or the House of Commons; if a report had been made by the committee, and the clerk were subpœnaed to bring it in evidence, any person, who insisted on its production, would be committed by the house for a contempt. So, in those matters which relate to the prerogatives of the crown, the officers are not compellable to produce the reports made in consequence of the direction of the crown, and cannot be allowed to give them in evidence without the consent of the king, any more than, in the case of a report of the House of Lords or the House of Commons, a person would have that right, without a direct order from one or the other house of parliament. The cases cited to show that military courts of enquiry are not allowable, are not applicable: they are cases where the general body of the public might be prejudiced. But this is the trial of an individual who is an officer in the army, and who submits to the regulations of the army; for, this Defendant by accepting a commission, agrees to abide by all the prerogatives which the king may have over the army; and, therefore, he cannot say, if the crown has been in the habit of directing these courts of enquiry, that they are illegal. In other departments below the crown, where the conduct of particular individuals is submitted to a superior, the head of the department would have a right to enquire into the conduct of the parties under him. The archbishop of a province, or the bishop of a diocese, who had a complaint against a clergyman, would have a right to direct clergymen of the diocese to hear that complaint, and make a report to him as to the conduct of that clergyman, with a view to punishing him. A report made in pursuance of such direction would be a confidential communication, which the clergy-

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men would be bound to make; and, even if they were not bound to do so, still, if the party felt aggrieved by the report, he could not compel the disclosure of that document; because it is a communication made compulsorily in consequence of the head of the department having directed the enquiry. *A fortiori*, therefore, a report made in consequence of a direction from the crown shall not be disclosed. There are not many cases upon the subject, because the principle has never been disputed. Many cases have been quoted to show that an action will lie; but that question does not arise here. The case of *Robinson* v. *May* is not at all like the present; even as to the form of the action: the communication in that case was voluntary; the Defendant was not desired, much less commanded, to make it: but, in this case, a command compulsory on the members of the court issues from the sovereign; and their report, therefore, is not like a voluntary communication from an individual. In *Atherfold* v. *Beard* (a), a wager was laid whether a local collection of the duties on hops would amount to more in the year 1785, than it amounted to in the year 1786. But the fact was not allowed to be proved, and *Buller* J. there says, "I am glad to find that in the only two cases where this question has arisen at *nisi prius*, Lord *Mansfield* and my brother *Ashurst* were both of opinion that the officers were not bound to produce the revenue books." The case before the court is much stronger than that of *Wyatt* v. *Gore* (b), because it did not appear that the communication rejected as evidence in that case, arose on a proceeding ordered by the governor: it was merely some communication with the Attorney General; some conversation on the conduct of the Plaintiff. If that communication was privileged, a communication consequent on the direction of the commander-in-chief,

(a) 2 *T. R.* 610. (b) *Holt. N. P. C.* 299.

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to persons not competent to disobey, must be privileged. In *Cooke* v. *Maxwell* (*a*), *Bayley* J. thought evidence of orders given by a governor of a colony to a military officer, not admissible on the same grounds: but he allowed the cause to proceed, because there was other evidence. In *Anderson* v. *Hamilton* (not in print) (*b*), Lord *Ellenborough* refused to admit in evidence the contents

(*a*) 2 *Starkie N. P. C.* 183.

(*b*) *J. W. Anderson* v. Sir *W. G. Hamilton*, knt.; *coram Ellenborough* C. J. (*Middlesex* sittings after *Hilary* term, 1816.) In this case, which was an action by the Plaintiff against the Defendant, governor of *Heligoland*, for false imprisonment, the counsel for the Plaintiff examined the Earl of *Liverpool*, who was, in *November*, 1810, secretary of state for the colonial department, as to the contents of a letter received by the Earl from the Plaintiff at that time. Lord *Liverpool* said, that he had no recollection of the contents of the letter in question; but that he recollected receiving a complaint from the Plaintiff against the Governor of *Heligoland* about that time, and that a correspondence took place between himself and the Governor, which was on the records of the office. *Ellenborough* C. J. said that the letter must be produced in the usual way, or the next best evidence be given. The counsel for the Plaintiff then called *Henry Goulburn*, Esq., the under secretary of state for the colonial department, who said that he had with him the letter in question, as also copies of all Lord *Liverpool's* letters to the Defendant in consequence of the Plaintiff's complaint. The counsel for the Defendant then objected, as to the first letter enquired for, that it was written by the Plaintiff, making a complaint against a person holding rank in one of the dependencies of the country to a person then conducting the colonial department of the government, and that it was not affected to be stated as written with the knowledge of the Defendant; and, as to the rest of the evidence proposed to be given, that it was a correspondence between the secretary of state and a person acting as the representative of his majesty's government. To this correspondence the Governor was no further a party than as he was called upon to communicate, in the most confidential manner, what had transpired in the island. In a private contest by an individual against that Governor, the security of the state made it indispensably necessary, that letters written under this seal of confidence should not be disclosed, and that a breach of the privilege given by the law to such communications would be highly dangerous to the interests of the state. The counsel for the Plaintiff observed, that they only wanted to establish the fact of the first letter being written, in order to lay a foundation for the answer; that, if they had sought to have the whole of the correspondence in evidence, the second objection might

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contents of a letter written by an agent of government in one of the colonies, to Lord *Liverpool*, then secretary of state, or his Lordship's answer. In that case, Lord *Ellenborough* treats all official communications as being of such a nature, that they ought not to be disclosed. At the state trials in 1794, communications of this nature were offered in evidence and rejected. The cases collected in *Phillips's Evidence* (a), generally illustrate the position that such communications ought not to be disclosed.

might have been valid; but that the answer written by Lord *Liverpool* to the Plaintiff, in answer to the letter of complaint against the Defendant, was all that they asked, in order to prove the fact that the Plaintiff did complain to Lord *Liverpool;* or, if that would be disclosing too much, a mere extract of that part of the answer which established that fact.

Ellenborough C. J. said, The answer is much more objectionable than the principal letter; for the answer is an official paper, the principal letter is only a complaint against an individual. My doubt arises on this, if the objection had been made by the noble Earl to the production of this correspondence as a matter of state, I should have given the fullest effect to that objection. I remember, upon some of the state trials, Lord *Grenville* was called to produce some letter which was supposed to have come to his hand, having been intercepted in the course of the post, or something of that kind. I speak from recollection: I do not know whether I am correct; but, upon the objection, it was thought that secrets of state were not to be taken out of the hands of his majesty's confidential servants. Now, I am very unwilling to have the evidence of what Lord *Liverpool* has written by way of observation on the Plaintiff's complaint; for it might be used as a condemnation collateral to the facts of the case I do not like breaking in upon this correspondence; it might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance. Then, it is said, the fact that there has been a complaint made against the Defendant by the Plaintiff to Lord *Liverpool*, is the only fact sought to be put in evidence on this occasion; but it is not competent to the Plaintiff to get at that fact, if it be embodied in an official letter. Neither can an extract of such a letter be admitted, for the Plaintiff must be entitled to the whole or none; and I think that the whole of this letter is not admissible, on account of the objections taken by the counsel for the Plaintiff.

(a) Vol. 1. p. 294. 4th ed.

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closed. Then, if the original be privileged, the copy can not be received in evidence. Proof of a fact by such copy is not proof *aliundè*, but through the medium of a copy of that which ought not to be delivered without the authority of the king himself. In many cases where a person cannot produce the original, he may produce a copy; but, if the objection to the production is that the contents ought not to be disclosed for reasons of state policy, a copy must stand excluded on the same objection.

Evans in reply. There is no difference between a soldier and any other citizen, except by the mutiny act: that act gives the king great power; but it is not too great a boon for officers to ask, that they may not be deprived of their character and commission, unless the parties against them are examined on oath. A secretary of state or governor, are in the cases put, both acting legally within their authority; and the governor would be justified and the secretary of state also, in refusing to disclose communications made to them in that character: but, in this case, it is contended, that there is no legal power to appoint such a court as that by which the Plaintiff suffered; and, therefore, it is impossible to say that the cases stand on the same footing. If the order be illegal, it cannot be compulsory, nor is it competent for the Defendant to defend himself by saying that he was commanded by the sovereign. As to the assertion, that an officer voluntarily submits to this tribunal when he enters the army, he submits, when he enters the army, to the mutiny-act, to the trial by a court-martial, and nothing else. A report of a committee of the House of Lords or Commons, it has been urged, could not be received in evidence. The question of privilege is very undefined, and no authority for this position is to be found in the books: but, there is a distinction between

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tween those houses and the king; he cannot direct any person to be confined: they can do so. A court of enquiry is not, as has been stated, like a grand jury: the grand jury never give any opinion, save whether the party charged is to be tried or not; that tribunal is a protection to the subject: but the court of enquiry, in this case, gave an opinion, on which the Plaintiff was immediately dismissed from the army. In Sir *John Mordaunt*'s case, which is the most ancient, a court-martial followed the enquiry; and he complained that this court of enquiry prejudiced the subsequent court-martial against him. (*a*) The case of a bishop and archbishop have been brought forward, and they differ very little from the case before the court: but, no case has been cited, where a bishop or archbishop has deprived a person of his situation without bringing his conduct before a legal court. An excise officer could not be called on to produce a report concerning the revenue of the country; but there is no similarity between that case and the present. Under the circumstances put in that case, no man could have a right either to the original or the copy of such a document: but the Plaintiff here was served with a copy; he was ready to produce it, and the production of it was disallowed. It has been said that the king is at the head of the army, he is also at the head of the church, at the head of the law, at the head of every thing: if he has the power contended for over the army, he has it in every other instance. It is true it will not be intended that the king will do any thing unjust; but he must act by others; and, if this

(*a*) Col. *Home* solicited and was promised a trial by court-martial; but the Judge-Advocate having twice given an opinion that the matters alleged against Col. *Home* were not cognizable by a military tribunal, these matters were ordered to be investigated, and were finally decided on by the assemblage of officers called a court of enquiry.

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power be established, the character of every individual in the country is at the mercy of government.

DALLAS C. J. In the argument at the bar, a great deal of matter has been discussed which does not appear to us to be connected immediately with the present subject. The only question now before us is, whether the minutes in question which were offered in evidence were properly rejected: this depends upon the nature of the proceeding; and, therefore, it is necessary to examine, in the first instance, what that proceeding was. The action in question is an action for a libel. The Plaintiff was a lieutenant-colonel in the army, and a captain in the third regiment of Foot Guards; the Defendant is a major-general, and, at the time of the transaction in question, was a colonel in the army. In consequence of certain transactions or suspicions, for I will call them by the latter name, supposed to be derogatory to the character of the Plaintiff as a gentleman and an officer, his Royal Highness the commander-in-chief gave a direction, —which we all know is frequently given upon occasions of this sort, and, as I have no hesitation in saying, is most beneficially given, — a direction, which, instead of being the exercise of an act of severity, is very frequently the exercise of an act of tenderness and mercy to the party. Instead of bringing the Plaintiff formally, and in the first instance, before a court-martial, the commander-in-chief directed an enquiry to be made, by the holding of a court for that purpose. The proceeding was, therefore, in its very nature an official proceeding, directed by the commander-in-chief, for the purpose of obtaining that information, which he was bound to obtain as to the conduct of every officer holding a commission in his majesty's army, and in furtherance of the exercise of his public duty upon the result of such enquiry, whether the enquiry was to cease

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in the first instance, or whether the result of that enquiry was to lead to any ulterior measure. The consequence of this was, that a court of enquiry was held, of which the Defendant in this case was the presiding officer; that court of enquiry was held in consequence of a duty created by the order of the commander-in-chief, which was imperative upon him; and a report made by the Defendant, in conjunction and connection with the officers, was an act of duty imposed upon him as a military man, by his superior commander, the commander-in-chief, whose order he was bound to obey. We have heard a great deal in this case, concerning the nature of the proceedings of a court of enquiry. Whether these courts were first held in the year 1757, or preceded that year, is to me perfectly immaterial in my view of the case; for we all know that, considering to what a height of greatness and glory the armies of this country have risen, from that time up to the hour when this court of enquiry was held, the convenience, at least, of this practice has been such, that no man has ever been deterred from entering into the army on that account; and it is quite impossible not to see, that the Plaintiff in this case, when he did become an officer in the army, knew, that, in point of fact, he voluntarily subjected himself to that court of enquiry, to which he must have known that officers in other instances had been made amenable.

The evidence in question was the result of the enquiry made by the Court, delivered by the Defendant to the commander-in-chief in the exercise of his military duty, and retained by the commander-in-chief, as an official document, in the possession of the secretary, Sir *Henry Torrens.* It originated, therefore, in a military order of a person holding a high and responsible office under the crown; it was executed in consequence of that order; it was returned and deposited in that place in

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which all official acts of such a description are to be deposited; and the question, then, is, whether, under these circumstances, — I will not say Sir *Henry Torrens* would have been *compelled* to produce the result of this enquiry; — but, whether, if he, under a mistake, had been disposed so to do, it would not have been the bounden duty of the learned judge before whom the cause was tried, considering that this document was a secret, not the privilege of the party holding it, but of which he was a trustee on behalf of the public, to have interposed and prevented the admission of such evidence. Now before I examine the few instances alluded to as applying to cases of this description, let us see upon what ground and principle the present case rests. It is agreed, that there are a number of cases of a particular description, in which, for reasons of state and policy, information is not permitted to be disclosed. To begin with the ordinary cases, and those of a common description in courts of justice. In these courts, for reasons of public policy, persons are not to be asked the names of those from whom they receive information as to the frauds on the revenue. In all the trials for high treason of late years, the same course has been adopted; and, if parties were willing to disclose the sources of their information, they would not be suffered to do it by the judges. What is the ground, upon which these cases stand, except it be the ground of danger to the public good, which would result from disclosing the sources of such informations? — for no person would become an informer, if his name might be disclosed in a court of justice, and if he might be subjected to the resentment of the party against whom he had informed. Does not this reasoning apply closely to the case now before us? This is an enquiry directed to be made by the commander-in-chief, with a view to ascertain what the conduct of the party suspected might

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have been; in the course of which, a number of persons may be called before the court, and may give information as witnesses, which they would not choose to have disclosed: but, if the minutes of the court of enquiry are to be produced in this way, on an action brought by the party, they reveal the name of every witness, and the evidence given by each. Not only this, but they also reveal what has been said and done by each member of the existing court of enquiry. It seems, therefore, that the reception of the minutes would tend directly to disclose that which is not permitted to be disclosed; and, therefore, independently of the character of the Court, I should say, on the broad rule of public policy and convenience, that these matters, secret in their natures, and involving delicate enquiry and the names of persons, stand protected.

The only case which has been referred to, as a case more immediately in point, is that which was decided by Lord Chief Justice *Gibbs* (a), and there, the witness proposed to be examined, was the Attorney-General of the province, who was called, and asked as to the nature of some communications, made to him by the Defendant relative to Mr. *Wyatt*'s conduct. Mr. Serjt. *Lens*, for the Defendant, objected to this evidence, "that it would be highly indecent for a public officer to disclose what passed between him and the governor upon that occasion; and that it was a confidential communication." — What was this report, in its very nature, but a confidential communication, in consequence of a direction by the commander-in-chief, for the information of his own conscience in the exercise of his public duty, as to whether he should suffer the plaintiff to continue an officer or not; in a case, in which it must be agreed and admitted, that, independent of any enquiry whatever,

(a) *Wyatt* v. *Gore*, *Holt*, N.P.C. 299.

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his majesty, in the exercise of his prerogative, might have dismissed him at any time? —Then, in deciding on the validity of the objection, the Chief Justice said, "The witness is not bound to answer; and, in delicacy he will not answer such questions. Whether the conversations, in which reference was made to Mr. *Wyatt*'s conduct as surveyor-general were on public or private business, they ought not to be disclosed. The governor consults with a high legal officer on the state of his colony; what passes between them is confidential: no office of this kind could be executed with safety, if conversation between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be given in evidence." — Now, what is this proceeding, but consulting with those who are bound to give the advice which is required, as to the exercise of a public duty? and, whether the case be that of the attorney-general of a province advising the governor, or of an officer present at a court of enquiry directed to be held by the commander-in-chief, it is equally a case of advice and information, given for the regulation of a public officer. It seems, therefore, to us, upon the broad principle of state policy and public convenience, and upon the principle of all the cases cited, that the Chief Justice of the Court of King's Bench was perfectly right, in not suffering these minutes to be brought forward at the trial. This judgment must be, consequently, affirmed.

Judgment affirmed.

(IN THE HOUSE OF LORDS.)

JOSHUA ROWE, Esq. *v.* ISAAC YOUNG.

If a bill of exchange be accepted payable at a particular place, the declaration in an action on such bill against the acceptor, must aver presentment at that place, and the averment must be proved.

THE Defendant in error was indorsee, and the Plaintiff in error was acceptor of a certain bill of exchange, dated the 20th *December*, 1815, drawn by *James Meagher*, at *Gosport*, upon the Plaintiff in error, at *Tor-point*, requiring the Plaintiff in error, two months after the date of the bill, to pay to the order of *James Meagher* the sum of 300*l.* value in account, which bill was accepted by the Plaintiff in error, payable at Sir *John Perring* and Co., bankers, *London*, and indorsed by *James Meagher*, to the Defendant in error; and which bill, when the same became due, was dishonoured and unpaid. Whereupon the Defendant in error, after the said bill was dishonoured, commenced this action in the court of K. B., and in *Trinity* term, 56 *Geo.* 3., obtained judgment upon demurrer, against the Plaintiff in error, as the acceptor of the said bill of exchange. The first count of the declaration in the action was framed upon the bill of exchange as above described; but the declaration likewise contained all the money counts, and concluded with the common breach. The Plaintiff brought error returnable before the Lords in Parliament, and

The special error was, that it was not stated nor averred in or by the first count of the declaration, that the bill of exchange was ever presented for payment at the said Sir *John Perring* and Company's, at which place the said bill of exchange was, by the acceptance, made payable.

The Defendant joined in error; and in *Trinity* term last and the subsequent vacation, the case was argued by

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by the Attorney-General and *Wilde*, for the Plaintiff in error; and *Holt* for the Defendant in error. (*a*)

On the conclusion of the argument, the Lord Chancellor desired to have the opinion of the twelve judges upon the four following questions:

First, Whether, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir *John Perring*'s and Co., bankers, *London*, (that is to say,) at the house of certain persons using in trade and commerce the names, style, and firm of Sir *John Perring* and Co., bankers, *London*, the holder was bound to present it to that house for payment, and to aver in the declaration that the same was presented to that house for payment?

Secondly, Whether the said bill, having been so accepted as aforesaid, such acceptance is, in law, to be considered as a qualified acceptance, to pay the same at the said house of Sir *John Perring* and Co., bankers, *London*; or, as a general acceptance to pay the same, with an additional engagement or direction for payment thereof at that house?

Thirdly, Whether, if *A.* draw a bill upon *B.* in favor of *C.* for 100*l.*; and *C.*, without the previous authority or subsequent assent of *A.* take an acceptance of the bill for the whole of the 100*l.*, but an acceptance qualified as to the time or place of payment; *C.* could, notwithstanding his taking such acceptance, maintain an action upon the bill against *A.*?

Fourthly, Whether, if *A.* were debtor to *C.* in 100*l.*, previous to his so drawing upon *B.*, in favour of *C.*,

(*a*) The reasons, argument, and cases cited on both sides are so fully discussed in the Lord Chancellor's opinion, and in the opinions delivered by the Twelve Judges to the House, that it was deemed unnecessary to insert them here.

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to the amount of 100*l.*, *C.* could, upon *A.*'s refusing his assent to an acceptance, qualified as mentioned in the above question, maintain an action upon the original debt against *A.*, without delivering to *A.* the bill so accepted, in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100*l.*?

There being a difference of opinion among the learned Judges, they subsequently delivered their opinions on these questions *seriatim* (*a*); and on the 17th *July* the Lord Chancellor (*b*) and Lord *Redesdale* expressed the following opinions.

The Lord Chancellor (after stating the record). My Lords, the writ of error in this case brings before your Lordships the question, whether it was or was not necessary, in the first count of the declaration, to allege or state expressly, or to allege or state in substance and effect, so that it might be collected from the first count of the declaration, that the bill had been presented and shewn to the Plaintiff, either when it became due and payable, or before that time, or since that time, at Sir *John Perring*'s and Co., bankers, *London*; and that question may be stated in another way, namely, whether this acceptance, as stated in the first count of the declaration, is to be taken to be a general acceptance, making the party accepting liable to pay every where; or, whether there is (what in some cases is called an expansion of the undertaking, and in other cases is called an engagement or direction in addition to the general unqualified acceptance to pay,) a direction and engagement to pay at Sir *John Perring*'s and Co., thrown in for the convenience of both parties, but which the holder of the bill is not bound to attend to unless he chooses; or, on the other hand, whether this, upon looking at the terms of the declaration, is what is in law called a qualified acceptance? And, my Lords, undoubtedly, it is very fit this question

(*a*) See the Appendix to this case. (*b*) Lord *Eldon*.

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should be brought before your lordships; because the state of the law, as actually administered in the courts, is such, that it would be infinitely better to settle it in any way, than to permit so controversial a state to exist any longer.

It has been stated at the bar, and there can be no doubt that it has been there correctly stated, that the Court of King's Bench has been, of late years, in the habit of holding such an acceptance as this to be a general acceptance, with what the judges of that court call an expansion, or a direction, or an engagement, which introduces, not a qualified promise, but a sort of courtesy, a kind of accommodation between the parties, in addition to the effect of the general acceptance; to which accommodation or courtesy, however, they hold, that the holder, of the bill is not at all bound to attend. On the other hand, it has been stated to your Lordships, and there can be no doubt of the fact, that the Court of Common Pleas is in the habit of holding, that such an acceptance as this is a qualified acceptance, and that the contract of the party is to pay at the banker's; and, of holding it as matter of pleading, that presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment. It has been further represented that, although, in the present state of the law, the principles of law, as applied to promissory notes and bills of exchange are simple enough in common cases, the Court of King's Bench has held, that if a man promise to pay at a particular place by a promissory note, (at the *Workington* bank, for instance,) the presentment, which is, in point of law, a demand, must be made there, because the place stands in the body of the note, and, being in the body of the note, it is part of the written contract which must be declared upon, as it exists, and proved as declared; but, that, in the case of bills of exchange, the same Court has held, that the place at which by its acceptance a bill is made payable, is not

not in the body of the bill; and, not being in the body of the bill, the Court has taken it for granted, that it is not to be considered as being in the body of the acceptance, a conclusion, which it is extremely difficult, I think, to adopt; because it seems hard to say, that combinations of various kinds may be infused into the acceptance, (for example, qualification as to time, as to mode of payment, as to contingencies, upon which the acceptor will pay, and various other qualifications which will be found in the cases,) which they unquestionably may be, notwithstanding the generality of the bill as drawn, but that, if the acceptance contain a qualification clearly and sufficiently expressed as to place, that qualification ought not to be introduced into the acceptance.

In addition to being told that the decisions of the Court of King's Bench upon bills of exchange cannot be reconciled with the decision of that court upon promissory notes, your Lordships are told, that the decisions of that court upon bills of exchange are not all consistent with each other. It is a little difficult to say that they are; but, undoubtedly, it may be represented as the opinion of that Court in judgment, that this species of acceptance is a general acceptance, with that kind of expansion, direction, or engagement, to which I have been alluding. The Court of Common Pleas being of a different opinion, it is impossible, my lords, for any man to feel that he has incumbent upon him the duty of giving the best opinion which he can form upon a question, on which so many men of high professional character and great professional learning have differed, without giving that opinion with a good deal of diffidence; but he must remember that it is his duty to give his opinion, whatever it may be.

The first question is, whether this is a qualified acceptance. Upon that question, the twelve judges have given your lordships their opinion, and a great majority of

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of them are of opinion, that it is a qualified acceptance. Some of the judges have given your lordships their opinion, that it is a general acceptance with an expansion, direction, or engagement for the convenience of one or other of the parties, which, one does not very well know; and that the acceptance meant, that if the holder chose to go to Sir *John Perring*'s and Co., he would probably there get payment of the bill. Then, another question is this, supposing this to be a qualified acceptance, was it necessary to aver the presentment in the declaration, and to support that averment by proof? A great majority of the learned judges, (including some of those who thought this a qualified acceptance) say, that it is not necessary to notice it as such in the declaration, or to prove presentment; but, that it must be considered as matter of defence, and that the Defendant must state himself as ready to pay at the place, and to bring the money into Court, and so bar the action, by proving the truth of that defence. Some of the judges, to whom I am alluding, (having been most eminent in special pleading,) deny this proposition, and say, that the Plaintiff must declare upon the contract as it is, that he must make out his right to sue, according to that contract; and, if that contract engage for payment at Sir *John Perring*'s and Co., he must state in the declaration, that he has demanded payment at Sir *John Perring*'s and Co.: in short, their opinion is, that the Plaintiff has no cause of action, unless he have performed his part of the contract.

I think, my lords, I may venture to state, upon the cases which I have taken a great deal of pains to search, (for I hope I have read every case upon the subject,) that a person may, undoubtedly, draw a bill of exchange, as we are in the habit of making a promissory note, payable at a particular place: the effect is, that the acceptor of such a bill has promised to pay at that particular place, and that the drawer, on default of the acceptor, has promised to pay at

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at that particular place; but there seems a great objection made to the doctrine, that, if a drawer has drawn generally, the acceptor can accept specially. The question appears to me to be, whether the acceptor has accepted specially; and I cannot imagine, if the contract of *A.*, (he being the drawer) be general, how it is from thence to be reasoned, that I, the acceptor, need not come under any engagement, unless I choose to come under the engagement proposed by *A.*, and that I cannot qualify my acceptance, and say to the holder of the bill, it is very true, the drawer has drawn upon me, and expects me to make myself liable generally; but that is not what I choose to do; if you will not take an acceptance from me, by which I can consult my own convenience, by telling you that I will pay you at a given place and time, you shall have none at all. Cannot an acceptor accept in a qualified way? That he can, is clearly established by cases which extend to almost every species of qualification; and, unquestionably, if the qualification as to place cannot be adopted by the acceptor, it must be on account of some circumstance which belongs to the place, and does not belong to the time or the mode of payment, or any other species of qualification whatever. My Lords, I am ready to express my full assent to the doctrine, that, where a bill is drawn generally, (considering that as an address to the person who is to accept it generally, because it is drawn generally,) it lies upon the acceptor, who says, that he has accepted specially, to accept in such terms, that the nature of his contract may be seen from the terms he has used, and that that may clearly appear to be a qualified acceptance, which he insists is not a general acceptance.

The first question, then, here, will be upon the words, whether this is or is not a qualified acceptance. Now, my Lords, I really do not know how it is possible to say, that this is not a qualified acceptance; I mean independent

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of the cases which have been decided; because, if a man draw upon me who am living in *London*, and I say, I accept according to the usage and custom of merchants, payable at my bankers, *Child's* and Co., *London*, I only desire to ask, (putting the usages of merchants, and putting the effect of these cases out of the question, for a moment,) whether any man could read an acceptance of mine in these terms, and say that it was, not only an acceptance of mine, payable at *Child's*, where those funds would be, which were to pay it, but that it was an acceptance by virtue of which (as is admitted by those who have argued about the convenience and inconvenience, and who have looked at the *argumentum ab inconvenienti*) the holder of that bill might arrest me, and hold me to bail in any part of the world. My Lords, after revolving this question again and again, in my mind, with the full consideration of what has been stated about the practice and contrary decisions, I cannot say that it was not the intention of the party who thus accepted, to come under an engagement, which may be represented as an acceptance, to pay the bill at Sir *John Perring's* and Co., *London*.

Then, it is said, that the word "accepted" forms the general engagement, and that the words "payable at Sir *John Perring's* and Co." cannot qualify, and cut down the general engagement; and cases are then cited, which maintain a distinction between words of qualification in the body of a note, and words of qualification in the margin, or at the foot of a note; and there are cases maintaining the distinction, that if such words be in the body of the note, they form part of the contract; but, if they be at the foot, or in the margin, they form only a memorandum. I do not mean to disturb these cases at all, but I do not understand how it is, that from these cases it is to be inferred, that, when I write the words "accepted, payable at a given house," the

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word "accepted" is to be taken to express the whole of my contract, and that, though the sentence is not complete till I write the whole, the latter part of it is not to be taken as part of the contract, but as a direction, or expansion, of the engagement. Your Lordships have heard a great deal of this *argumentum ab inconvenienti*, but I cannot help thinking, that this is a mode of reasoning, which is not quite analogous to our usual modes of reasoning in the courts below on the question of what men are likely to do or not to do. The case is put in this way. — Supposing bills were drawn on each of the twelve judges of *England*, just before they left town on the circuit, and they had accepted the bills, payable at their respective bankers, if it be law that such an acceptance renders them liable to pay any where, the holders of those bills might undoubtedly, if they pleased, arrest the judges at their respective circuit towns, a little to the inconvenience of the administration of justice. — It is said, no man would think of arresting the judges. My Lords, I hope nobody would think of arresting the judges; but I can feel for mercantile men, just as well as I can feel for judges, and I can feel for men exposed to the inconvenience of demands upon them which are to be regulated not by their contracts, but by a construction being given to their contracts which they meant should be never given to them. My Lords, in this very case, (and it seems not to have been very much considered,) the acceptor is at *Torpoint*; and, having his money in *London*, where it is usually demanded of him, he says, If you make your demand upon me, here, I cannot pay you; but I have at *Child's* or *Drummond's* shop money to pay you, and you will be sure to find it there. Is it no matter of inconvenience, that such a man may, from caprice, if you please, (and we have heard of such things, as men through caprice refusing a tender of Bank of *England* notes, and so forth,) be obliged to bring

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money from *London*: or is he to keep money in *London* and at *Torpoint* too, to answer the exigency of the demand, as it may happen to be made at the one place or the other.

My Lords, there is another consideration, which does not appear to me to have been so much attended to as it might have been, namely, that, if I promise to pay at my bankers in *London*, and a man calls upon me to pay in *Northumberland*, it is not the same thing; for, looking at the demand as likely to be made at *Child*'s shop, I send the money there, but, if I am to pay in *Northumberland*, there must be the exchange, and remittance, and so on, backwards and forwards. But take the case of a gentleman leaving *Calcutta*, and coming to reside in *London*, who gives a bill of exchange in *Calcutta*, to be paid there, six months after he departs: he arrives in *London*, not bringing a shilling home to pay that bill, — he finds the bill sent home by another ship, and he is arrested the moment he lands. Is the sum which he is obliged to pay here, the same with that which he would have paid there, and for paying which, he had made preparation? Certainly not. — It appears to me, therefore, that, even with respect to the value of what is to be paid, there is a most essential difference in the contract.

Then, it is said, this will be extremely inconvenient; and it was with a view to see what the balance of convenience and inconvenience would be in that part of the case, that I took the liberty, with your Lordship's permission, to put the third and fourth questions to the judges. It is said this may vary the right of the holder, in respect of the drawer, unless he the holder give notice, and so forth, to keep his liability alive. My Lords, the answer to that, as it seems to me, is this, that if you once admit that a man may accept specially, it is the consequence of the law, that these difficulties arise: if you will say that

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no man shall accept specially, a bill which is drawn generally, that settles the question; but, if you say that the law is — though a man draw generally, the drawee may accept specially, — it is the consequence of the law which imposes duties upon the holder to give notice to the drawer, to keep alive the drawer's liability, and that inconvenience certainly is not quite so large as if the acceptor refused to accept at all.

Then, it is said, that this will impose great difficulty the indorsee, that a person sometimes becomes an indorsee before, and sometimes after acceptance; if he become an indorsee before, he may find a special acceptance when he expected to have a general acceptance; but then, when the bill is indorsed to him unaccepted, he does not know whether it will ever be accepted; and, if he do not know that it will be ever accepted, he cannot tell whether it will be accepted specially. He knows, therefore, at the time of taking that bill by indorsement, that he is to look out for such an acceptor as he can find. What is there inconsistent with the rule of law or convenience in this? I cannot see any thing.

It would be a very unnecessary fatigue to your Lordships to go through the whole of this case from the beginning to the end. It does appear to me that no one can say, the case is settled in law; you must therefore go back to principle. If you go back to principle, and admit that a man may give a qualified acceptance, the question is, whether this is a qualified acceptance, aye or no? If it be a qualified acceptance, — if it be an acceptance where the contract of the party is to pay at Sir *John Perring*'s and Co., — then I state it to be in pleading settled matter, that you must declare according to the contract, and that you must aver all that the nature of that contract makes necessary. If that be so, if it be a special contract, and if it be necessary

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for you to aver all which the contract contains, how can it be said that it is not to be shewn in the nature of the demand, but that it must be left to be shewn in the defence? It appears to me that this position cannot be maintained. My Lords, with respect to the cases of bonds which have been cited, they differ, altogether, from a contract of this nature. You bring your action upon a bond for the penalty; it must, therefore, be matter of defence to say, that the bond would have been paid at a particular place; for that will be in the condition of the bond; when you pray *oyer* of the bond, you defend yourself by saying that you have performed that condition, and, that, therefore, you are to be excused from the payment of the debt. These cases, therefore, have no application to the case before your Lordships.

There is another set of cases, in which it is said, that, if there be an antecedent debt, the acceptance must be taken to be general. — Between the acceptor and holder there is seldom an antecedent debt; there may be an antecedent debt between the drawer and acceptor of the bill; I wish that there had been an antecedent debt in all cases, for accommodation bills have been the ruin of many: but, with respect to the acceptor, it is not true, that he must be antecedently the debtor; and all the cases with respect to qualified acceptance show that; for a man may accept to pay half the bill in money, and half in goods; he may accept to pay out of the produce of a cargo consigned to him when that cargo comes to this country. When your Lordships look to the situation of a consignee, you will find that his acceptance is always qualified. A ship's cargo comes from the *West Indies*, and the bill with it; the aceptance of such bill will be, of course, an acceptance to pay in *London*. — In every view of this case, I take the liberty to state to your Lordships as my opinion, (certainly stating it with infinite diffidence, as I ought, re-

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collecting that I am obliged to differ in opinion from those whose judgments no man can respect more than I do,) that this is a contract to pay at Sir *John Perring*'s and Co., which is not the contract stated in the first count of the declaration; for that count wants that averment; and the consequence is, that the judgment of the court of King's Bench must be reversed. I do not think that it will be of the least consequence to the commercial world; for it will be so easy to adopt forms of words which leave no doubt as to what is meant, that I am perfectly sure, if there were any inconvenience arising from the decision, if your Lordships think proper to make it, that those, who do not wish to have the inconvenience have nothing to do but to use two or three words, which will guard them from it. But the question is, What is the law of this day, upon this contract, as set forth in this first count of this declaration? I have already stated to your Lordships in a few words what my opinion is, and I sincerely believe it to be founded in clear principles of law; although, when I state that I do believe it to be so founded, I cannot but recollect, (and I do that with infinite respect,) that I am differing in opinion with those, whose opinion is infinitely superior to mine. But my duty is not to state their opinion, but to express my own.

LORD REDESDALE. My Lords, I most fully concur in the opinion expressed by my noble and learned friend. It does appear to me that some of the learned judges have totally forgotten acceptances for honour. If a person accept for the honour of the drawer, payable at a banker's in *London*, all the reasoning founded on the supposition, that the acceptor must be debtor to the drawer vanishes; and I do not observe, that the learned judges distinguished between the case of an acceptance

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for honour, and the case of a common acceptance. It is impossible to say, if these words were applied to an acceptance for honour, that any of the arguments founded on the supposed prior debt of the acceptor could be maintained.

But, my Lords, another part of the question which has been adverted to by the noble and learned lord, appears to me of infinite importance, I mean the acceptance of a bill payable at a place different from the residence of the acceptor. This bill is accepted by a man resident at *Torpoint*, payable in *London*, at a certain banking-house. What is asserted to be the effect of this acceptance? That he engages to have money both at Sir *John Perring*'s and Co., and at his own residence at *Torpoint*. If he accepted simply, he would engage only to have the money at *Torpoint*; but it is said, that, because he accepts with this addition, he engages to have the money at both places. This is making him engage for two things instead of one, and it does seem to me, that it must have been his intention to engage for only one, namely, a payment in *London*; for it is perfectly clear, that payment at *Torpoint*, and payment in *London*, are two different things: and, if he be liable to be called upon at both places, his liability is rendered more inconvenient.

This might be converted into a most fraudulent transaction, in reference to dealings between mercantile people residing at different places. Take the case alluded to by the noble and learned lord, of a bill accepted payable at *Calcutta*. Suppose that a person accepts a bill payable in *India*, and leaves funds for the purpose of answering that bill, the bill being payable in six months; he comes to *London*, and there the bill is demanded of him because his acceptance is general, and the words "payable at *Calcutta*" do not qualify that acceptance. The

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consequence of that would be, that the holder of the bill would gain the whole expence of the remittance from *India* to *England*, and we know perfectly well that that makes a very considerable difference. In an appeal very recently before your Lordships, it was a question, whether in an account of that description, the expences of remittance from *India* to *England* are or are not to be allowed; and it is part of the subject of appeal from a decision of the Court of Session in *Scotland*, that the appellant has not been allowed the expense of that remittance. It appears to me, therefore, that it is perfectly clear, that, if it were to be held, that the acceptance of a bill payable at a different place, is not to be held to be conditional acceptance, it may be used for the purposes of extreme fraud, to make a man pay that, which he did not mean to pay, and which the drawer did not expect him to pay in such a mode. Many cases might be put as to the *West Indies*, and other places, which were attended to by some of the learned judges, and into which it is not necessary to enter. If the words which have been added to this acceptance be construed, as having no operation in favour of the acceptor, how came they to have any operation whatever in favour of other parties? If they be not a condition annexed to the acceptance, how can it be granted, that the holder of the bill must, in order to entitle him to make a demand either against the drawer or against the indorser, show the bill to *Perring* and Co.? But, it is said, that this should be shown in the plea: the majority of the judges have been of opinion, that it is a qualification of the acceptance, but that the party is to take advantage of it in pleading. But, in order to do that, he is obliged to bring the money into court, (that is to say,) he is to do the very thing which, (in the case of an acceptance in *India*, for instance,) he ought not to be obliged to do, for, in that case, the acceptor must

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bring the money from *India*, to be enabled to bring the money into court. Upon these grounds, it appears to me, that it is infinitely better to hold, that these words do amount to a qualification of the acceptance imposing a precedent condition, which must be shown upon the record, for the purpose of setting forth truly the acceptance, and, that being set forth, it appears to me, that the party is bound to prove that which he has averred in the declaration, which goes to show, that the party taking such acceptance, has complied with the condition entered into between him and the acceptor. On these grounds, I perfectly concur with the noble and learned lord, that the judgment should be reversed.

The House, accordingly,
Reversed the judgment.

Appendix to Rowe v. Young.

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BEST J. Upon a question of such acknowledged difficulty as that, which is first proposed to us by your Lordships, one, on which the most eminent judges have pronounced directly opposite decisions, I address your Lordships with the utmost diffidence of my own judgment; but my duty to your Lordships prevents me from yielding to the difficulty which I feel; and obliges me to form the best opinion, that a consideration of the question with the greatest attention which I can apply to it, enables me to give.

I submit to your Lordships, that the words "payable at Sir *John Perring*'s and Co., bankers, *London*," qualify the general term "accepted," and render a presentment of the bill at the house of Sir *John Perring* and Co. necessary; (provided the acceptor had funds at that house on the day on which the bill became due, and Sir *John Perring* and Co. would have paid the bill;) but I do not think that it was necessary to aver in the declaration, that the bill was presented at that house for payment. If the acceptor would avail

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avail himself of the want of presentment of the bill at Sir *John Perring's*, he must plead to the action brought on it, that he had funds in the hands of Sir *John Perring* and Co. sufficient to take it up on the day when it became due, and that Sir *John Perring* and Co. would have paid it, had it been presented at their house; and he must pay the amount of the bill into court.

The first point to be settled is, whether the terms used amount to such a qualified acceptance, as makes the bill payable *only* at the bankers'; or whether they are to be considered, merely, as giving notice to the holder, that, if he will call at the bankers', he may obtain payment, without having the effect of compelling him to present the bill at the bankers', or imposing any other duty on him, than what is required from the holder of a bill, by a general acceptance.

Before I discuss this point, I would state, that, in my humble opinion, it imports the holder of a general acceptance to present his bill at the residence or place of trade of the acceptor: the qualified acceptance produces no other effect than that of changing the place of presentment from the compting-house of the acceptor, to the house of the acceptor's banker.

It cannot be disputed, that the drawee of a bill may accept it specially; and that such acceptance may narrow his responsibility below what it would have been, if he had accepted the bill according to its tenor. Special acceptances are recognised by a long series of decisions of all the courts of *Westminster-Hall*, from which it appears, that the drawee of a bill may limit his responsibility by any conditions which his own circumstances, or the situation of the drawer's funds may render expedient. In *Smith* v. *Abbot* (*a*), it was holden that a drawee may accept payable, when certain goods consigned to him are sold; and, in *Julian* v. *Shobrooke* (*b*), when in cash from the cargo of the ship *Thetis*. In *Walker* v. *Atwood* (*c*), a bill payable at sight was accepted payable three months after acceptance, and this was held to be a good conditional acceptance. If the time of payment may be postponed, the place of payment may be changed. It is another question, whether the holder is bound to take such an acceptance, and whether, if he take it without giving notice to the

(*a*) Str. 1152. (*b*) 2 Wils. 9. (*c*) 11 Mod. 190.

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drawer and indorsers, and obtaining their assent, he does not discharge them from all liability; but, if he does receive such an acceptance, he is bound by the terms of it, as between himself and the acceptor.

The next point to be considered is, are the words "accepted payable at Sir *John Perring* and Co.'s bankers, *London*," sufficient to express a special acceptance, making the bill payable at that house? They all form one short sentence; the words "payable at" following immediately after the word "accepted" without any break; and, as the word "accepted" raises an obligation in the writer to pay the bill when due; the words which follow "accepted" must be considered as confining the obligation to pay at the house of Sir *John Perring* and Co. What rule of construction allows us to say, that the first of several connected words is to be considered as forming the contract, and that the remaining words, although they seem to express a qualification of such contract, are to have no effect? With what justice can we hold a man to the obligatory part of the instrument which he has executed, and refuse him the advantage of the qualification which he has immediately annexed to it.

But, it has been said at the bar, that the acceptor is to be presumed to be the debtor of the drawer; that the debtor is liable to his creditor every where; that this liability cannot be narrowed, except by clear and express terms; and, that the terms used by this acceptor are not sufficiently clear to narrow his responsibility. I deny, that, under the circumstances in which the trade of the world is now conducted, a drawee is to be taken as the debtor of the drawer; but, if he is to be so taken, the drawing a bill for his debt, if it be accepted, restrains the drawer from claiming his debt at any other time or place (in the first instance) than when and where the bill is payable. Further, I insist, that the terms used in this acceptance are sufficiently clear, to fix the place of payment of this bill at the house of the bankers.

It is well known to be the practice of the consignors of goods, to draw on the consignees for the expected proceeds of such goods as soon as the goods are sent. The bills so drawn are, often, presented before the goods get to the hands of the consignees, and, generally, before they are sold. The special acceptances, in some of the cases to which I

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have referred your Lordships, were evidently made under these circumstances. In those cases, the drawee is no debtor of the drawer; nor can what is said as to the narrowing of a general liability down to a particular liability, have any reference to them.

But, suppose the drawee to owe the drawer money, for which the former is liable to be proceeded against at any time and place, and without notice. At the moment when the one has drawn, and the other accepted, a bill, the general right to sue which the drawer before had, is, in consideration of the acknowledgment of the debt and the security given for it by the acceptance, restrained: and the drawer can have no action until the bill is arrived at maturity, and the drawee (if able to pay) has been requested to pay it. I know, as against an acceptor, it is not necessary to aver a prior presentment of the bill; but, although such averment and proof be not required, I cannot persuade myself that you may arrest an acceptor who has been always ready to pay his bill, without any notice of the person, in whose hands it is. The opinion, that an acceptor may be sued at any time and place, and without any other demand than the writ, has arisen from inattention to the forms of pleading. I shall, presently, endeavour to explain this matter. I am aware, that there is great authority for this doctrine; but no authority, save that of your Lordships, will ever convince me, that it is part of the mercantile law of *England*. If this be the law, no merchant in the city of *London* can secure himself against arrests and the costs of vexatious actions; having money constantly in his house equal to all that he has to pay, and even carrying a like sum with him wherever he goes, will not protect him. According to this doctrine, the debt may be sworn to by the holder previous to any application for payment, and the first demand be made by a sheriff's officer. The acceptor of a bill seldom knows in whose hands it is when it becomes due; the holder is, frequently, at a considerable distance from the place of payment, and sends his bill to an agent unknown to the acceptor. The acceptor cannot do what other debtors may do, namely seek out his creditor and tender him his debt. The law will not require impossibilities; and all that it is possible for an acceptor to do, is to be ready with his money at the time and place of payment.

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As to the objection of want of precision in the terms used; let it be recollected, that this is a mercantile contract, and, that the loosest of all mercantile contracts is the acceptance of a bill of exchange. By the use of the single vague term "accepted," the drawee engages to pay the bill when it arrives at maturity: there is nothing like precision, nothing like a clear and unequivocal expression of obligation in this term, yet the acceptor is bound by it. Will you require more clearness and precision in the qualification, than in the contract to which it is annexed? But the words, however inartificial, are only capable of one meaning; nor would any man reading the bill, and not puzzled by the decisions of *Westminster-Hall*, think of putting any other construction upon them, than, that the payment which the acceptor binds himself to make, is to be made at the house of his bankers, and no where else. Suppose, instead of using the word "accepted," the drawee had written "when this bill becomes due, I undertake that it shall be paid at the house of Sir *John Perring* and Co., bankers;" could any man contend that, according to these words, he would have to be ready to pay it at any other place than the house of Sir *John Perring* and Co.? The words "accepted" imports, that, when the bill becomes due, the acceptor undertakes that it shall be paid: surely, the words, "at Sir *John Perring* and Co.'s" must have the same meaning, when added to the word "accepted," as, when added to other words meaning nothing more or less than is expressed by the word "accepted." It has been asked at the bar, how long the acceptor is to leave the amount of the bill in the hands of his banker? I answer, that he is never to remove it. By his special acceptance, he has charged that money with the payment of the bill at his banker's: he has, therefore, no power over the amount left at his banker's to pay it; it belongs to the holder of the bill, who may take it when he pleases. Should he not call for it within the time allowed to the holder of a banker's check to present the check at the banker's, and should the banker fail, the holder of the bill must lose his money: he would lose his money, if he took a check for his bill, and did not present such check in due time. It is decided in the case of *Saunderson* v. *Judge* (a), that a *memorandum*

(a) 2 *H. Bl.* 509.

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that a note would be paid at the house of *Saunderson* and Co. was an undertaking, that there should be cash there to pay the note; and an order on *Saunderson* and Co. to pay it. Your Lordships also know, that such an acceptance as is stated in your Lordships' question is treated by all bankers as a draft on them or order to pay the bill so accepted. A person who neglects to present such an acceptance on the day when it is due, must, therefore, subject himself to the same consequences as one who keeps any other draft or a banker's check, beyond the day after that on which it was delivered to him, when the banker fails.

With respect to the cases of *Smith* v. *De la Fontaine* (*a*), *Fenton* v. *Goundry* (*b*), and the *nisi prius* decisions which followed those cases; I am far from saying, that the judgments of the courts upon those cases were wrong; on the contrary, for the reasons which I shall presently offer, I should have concurred in those judgments, although not on the grounds stated by the Judges who decided them. As to the *nisi prius* cases, I think it would have been much better for the law, if the crude opinions of judges at *nisi prius* had never been allowed to be quoted to those who are sitting in bank. Of *Smith* v. *De la Fontaine*, we have only a very short and very imperfect report: it does not appear that Lord *Mansfield*, or the court of K. B. looked at the acceptance as a written contract, and considered what was the true legal construction of it. They proceeded upon some supposed understanding of the mercantile world, and did not give themselves the trouble of coming to any understanding on the subject. Lord *Ellenborough* and the rest of the judges seem to have taken the same course in *Fenton* v. *Goundry*. Where a construction is to be put on a mercantile contract, the Court do right to consider what has been the practice of merchants with reference to such a contract. But care must be taken to ascertain what the practice is, and I cannot think any court warranted by the opinion of one jury in pronouncing, that words which are incorporated in a contract form no part of it. It does not appear that any enquiry

(*a*) *Bayley on Bills of Exchange*, 3d ed. p. 129. note *b*.

(*b*) 13 *East*, 459.

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was ever made to learn the understanding of merchants on this subject, except by Lord *Mansfield* in *Smith* v. *De la Fontaine*.

I come, now, to the second branch of your Lordships' first question; namely, whether it is necessary, in an action on such a bill, to aver in the declaration, that the same was presented at the house of Sir *John Perring* and Co. for payment. I am aware that both the King's Bench and Common Pleas seem to agree, that, if the terms of an acceptance are obligatory on the holder to present the bill at the banker's, such presentment must be averred in the declaration. With the greatest respect for those who were judges of the King's Bench at the time when those cases were decided, I must say, much confusion seems to have prevailed amongst them on this subject. Lord *Ellenborough*, in his judgment in the action on the promissory note made payable at a particular place (*a*), answers his own argument in *Fenton* v. *Goundry*: nor can I subscribe to the propriety of the distinction taken by his Lordship and some others of the Judges, between the effect of the same words in a note and a bill. In an acceptance, the words form a part of the original contract of the acceptor, as much as they form part of the original contract of the maker in a note. In the Common Pleas, the question of pleading does not seem to have been much considered. It was scarcely put to that court by the argument at the bar, that the objection of want of presentment ought to have been made matter of defence. If presentment at the banker's be not a condition, the performance of which must precede the payment of the bill, there is no necessity for averring such presentment in the declaration. By a general acceptance, the acceptor undertakes to pay the bill in *London*; but it has never yet been thought, that before you can recover against the acceptor, you must shew a presentment on the day the bill became due. I cannot distinguish between the time of payment and place of payment, or discover any other difference between a general acceptance and a special acceptance payable at a banker's, than that, in the former case, the acceptor undertakes to have the money to take up the bill at his house of business, in the latter, at his banker's. If presentment on the day of payment, or

(*a*) *Sanderson* v. *Bowes*, 14 *East*, 500.

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place of payment, were conditions precedent, the holder, although prevented by causes which he could not controul, must lose his debt, if the bill were not presented on the day of payment, for the condition could not be performed on any subsequent day; and he must be subjected to the same loss, if the banker fails, for not presenting it at the house of such banker, although the acceptor had made no provision for its payment. Such a rule must always work injustice, and, therefore, cannot be law. The acceptor, if he would avail himself of the non-presentment of the bill, must shew by his plea, that he was ready at the time and place of payment to take it up, but that the holder did not attend; and must bring the amount of the bill into court. On shewing, that a tender of the amount of the bill was prevented by the default of the party to whom it should have been made, the want of tender will be executed. In all cases, a party is excused from doing what he otherwise ought to have done, by shewing that the other party prevented him from doing it. Arbitrators sometimes direct money to be paid on a particular day at *Lincoln's Inn* hall; and rents, annuities, and other payments are agreed to be paid at certain specified times and places. In actions for the non-payment of the money in such cases, it is not usual to aver in the declaration, that the Plaintiff attended at the appointed time and place in order to receive his money: and the early books of entries contain pleas, that the party to pay was at the place with his money, and that he who was to receive did not attend. 1st Question.

Upon the second question submitted to us by your Lordships, I humbly submit, that such an acceptance is to be considered in law as a qualified acceptance, to pay the same at the house of Sir *John Perring* and Co., and not a general acceptance to pay the bill with an additional engagement or direction for the payment of the same at that house. I have stated the grounds on which I have formed this opinion, in my answer to your Lordships' first question. 2d Question.

On your Lordships' third question, I beg to say, that it seems to me to depend on the nature of the qualification in the acceptance, whether the taking it without the previous authority or subsequent assent of *A.*, would prevent *C.* from maintaining an action against *A.* A qualification which may prejudice the drawer, would discharge him, if taken without his assent — such as an acceptance postponing the payment 3d Question.

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of the bill. An acceptance at a different town from that in which the bill was drawn, might have the effect of postponing payment, and also of preventing so early a notice of non-payment as might have been received from the town in which the bill was drawn. Besides, no line can be drawn limiting the distance from the place to which the bill is addressed, at which it might be made payable by the acceptance, beyond the town in which it is drawn. A qualified acceptance, making the bill payable at another town, taken by the acceptor without the assent of the drawer, would discharge the drawer. But I can perceive no prejudice which can arise to the drawer from the holder taking an acceptance which changes the place of payment from the acceptor's counting-house, to the house of his bankers in the same town. I believe that bills so accepted are more easily discounted than those which are accepted generally; and the greatest part of the bills of men in trade are now accepted payable at a banker's. Whoever draws a bill now, knows that, most probably, it will be so accepted. To allow a drawer or holder to make any objection on account of such an acceptance, would be to indulge their caprice, or give them a pretence for calling for their debts before such debts are fairly due. I have considered an acceptance payable at a banker's as merely changing the place of payment from the acceptor's counting-house to the banker's; and not as narrowing a right to demand the money any where, or to sue the acceptor without demand or notice; because I cannot conceive that any such right exists. Bills of exchange are often addressed to a man at a particular house, from which I infer that they are to be presented for payment at such house; and that there he is to prepare himself to pay them. If addressed to him in *London*, the meaning is, not that the bill may be presented any where in *London*; but it is presumed that the situation of the acceptor's counting-house is too well known to render it necessary that it should be mentioned in the address of the bill. There is a case in Lord *Raymond*, in which Lord *Holt* is reported to have held, that, if a bill be accepted without mentioning the house at which it is to be paid, the holder is not obliged to receive it (*a*); that learned judge could not have thought, that mentioning the house, narrowed the holder's right.

(*a*) *Mutford* v. *Walcot*, 1 *Ld. Raym.* 575.

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In answer to your Lordships' fourth question, I have to submit that, if *A.*, on receiving notice from *C.*, that the bill was accepted with a qualification as to the time or place of payment, refuses his assent to such acceptance, *C.* may treat the bill as not accepted, and proceed on it against *A.*, without delivering up the bill to *A.* If the drawer will not assent to the acceptance, which the person on whom he draws thinks proper to put to the bill, he cannot complain if proceeded against as the drawer of a bill, which the drawee has refused to accept. The bill is necessary to maintain the action against the drawer; and, therefore, the holder must be allowed to retain possession of it. *A.* having previously given such a bill for a debt due from *A.* to *C.*, the latter is not obliged to declare on the bill, but may bring his action for the original debt.

My Lords, I hope that what I have humbly stated to your Lordships as legal answers to the questions proposed to us, will be found to secure complete justice to all the parties to a bill, and to promote the convenience of those who are engaged in these negotiations. By allowing acceptances to be made payable at their bankers', merchants are relieved from the risk attendant on keeping large sums of money in their own houses. By holding that such an acceptance does not make presentment at the banker's a condition precedent, a just debt cannot be lost through accident or the negligence of clerks in not presenting the bill at the proper time and place; nor is a holder obliged to incur the expense and trouble of a presentment, when he is certain that no provision is made for payment: whilst, on the other hand, by allowing the acceptor to plead his readiness to pay, and bring the money into court, you prevent, by the penalty of costs, vexatious arrests and unnecessary actions. By allowing holders and drawers of bills to object to acceptances which may prejudice their right, but preventing either from refusing an acceptance, which, though not strictly according to the tenor of the bill, cannot possibly affect their interest, the rights of parties are secure, whilst their caprice is made to give way to the convenience of others.

Your Lordships have been repeatedly told by the counsel, both of the Plaintiff and the Defendant, of the inconvenience to commercial men which is likely to follow the establishment of what is contended for by the opposite party. There

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never was a case more free from apprehensions of this kind. Mercantile men only want certain rules upon these subjects. As soon as your Lordships shall have declared what are the proper rules, all judges will act upon them, and all mercantile men will regulate their transactions according to them. If your Lordships shall say that the acceptor may by his acceptance make his bill payable only at his banker's, but that the words used by this acceptor are not sufficient to express such a qualified acceptance, future acceptors will use terms which express this qualification of their contract more clearly. If drawers apprehend that such an acceptance is likely to occasion a return of their bills as being refused acceptance, they will guard against this by requesting, in the body of their bills, the drawee to accept them payable either at his counting-house or his banker's. Every holder will then know, that he holds their bills subject to their being accepted either generally or specially, and will, thus, be prevented from returning them for want of a sufficient acceptance.

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RICHARDSON J. (having stated the record and the four questions, and having informed their Lordships that he should, with their leave, consider the first and second questions together.) This is the case of a bill of exchange, drawn by a person at *Gosport*, upon a person at *Torpoint*, requiring him, in general terms, to pay, at two months after date, a sum of money to the order of the drawer, which the drawee has accepted, payable at the house of trade of certain bankers in *London*. The question is, what effect does such an acceptance produce on the drawer, as to the conduct to be pursued by him before he sues, and as to the averments to be inserted in his declaration, when he sues upon the bill? It has not been, and, I think, cannot be denied, that the drawee of a bill of exchange is at liberty to qualify his acceptance, as by annexing a condition, or by enlarging or diminishing the time of payment; and, as he may enlarge or diminish the time, so he may, by his acceptance, fix the place of payment; and, in all such cases, I think it follows, that, as he is no otherwise party to the bill than by his acceptance, the holder is bound to sue him according to his acceptance; for the acceptance is the only evidence of contract as to him. The time or place of payment expressed in an acceptance is as much a part of the acceptor's contract,

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contract, as the like expression of time or place in the body of a promissory note is part of the maker's contract: both, I think, are entitled to equal regard in ascertaining the rights of the parties. What then is the meaning of the terms of this acceptance, "Payable at Sir *John Perring* and Co.'s, bankers, *London*?" I think the meaning is the same, as if the acceptor had said, "I undertake to pay this bill at the house of Sir *John Perring* and Co. bankers, *London*." I think that it is not a general acceptance with an additional engagement or direction as to the place of payment superadded, but, that it is to be considered in law as an acceptance to a certain extent qualified; and, that the legal extent of this qualification is the same, as it is in other cases, where a man contracts to pay money at a particular place. It is material then to consider, what is the legal effect of a contract to pay money at a particular place? I apprehend it is this; that the debtor shall stand excused of damages and costs, if he is ready to pay the money at that place, according to his contract; but, that the debt is not lost to the creditor by an omission on his part to demand it there, except, perhaps, in cases where it can be shown that such omission has occasioned damage to the debtor. If so, it follows, that it is not necessary, on the part of the creditor suing for the debt, to aver in his declaration, that a demand was made at the place; but, that the Defendant, by way of excuse against damages and costs, must show, that he was ready at the place to pay, but that no one was there on the part of the creditor to receive: and, for this purpose, he must plead a special plea in the nature of a plea of tender, and must bring the money into court. Such, at least, is the general rule, namely, that the money must be brought into court: though I am not prepared to say, that an exception might not arise, if the Defendant, in any particular case, could show, that the money had since been lost by the neglect of the creditor to receive it at the time and place appointed. This, I apprehend, is the law in the case of covenants, and of bonds, with or without penalty, for payment of money at a particular place; and of rent, where a particular place of payment is expressed in the reservation; or, where it is not so expressed; in which latter case, the law makes it payable upon the land. I will mention some

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instances. In an action of debt for 28*l.* (*a*), the declaration stated, that the Defendant, by his bill obligatory, sealed with his seal (*profert*), at London, acknowledged himself to owe to the Plaintiff 19*l.* 16*s.* of the money of *Flanders*, (parcel of the 28*l.*), which 19*l.* 16*s* were then and still are of the value of 14*l.* of *English* money, to be paid to Plaintiff in the *Cold Mart* then next following. Then followed an averment, that the *Cold Mart* was a certain fair held at *London*, in the parish and ward aforesaid, from the 10th *August*, 1501, to the 20th *September* next following. The declaration then sets out another bill obligatory, for other 19*l.* 16*s.* *Flemish*, equal to 14*l.* *English*, to be paid at the *Paske Mart*, with similar averments; and concludes, "yet the said Defendant, although often requested, the said 36*l.* 12*s.* of *Flemish* money, nor the said 28*l.* of *English* money, has not paid to the Plaintiff, but to pay the same to him has hitherto refused, and still refuses." The Defendant pleads, that the *Cold Mart* was a certain fair held at *Bridges* in *Flanders*, in parts beyond the seas, without the realm of *England*, from a certain day to a certain other day, and that the 19*l.* 16*s.* were worth only 60*s.* of *English* money, and makes a similar averment as to the *Paske Mart*. He then avers, that he was at the said fairs, called the *Cold Mart* and the *Paske Mart*, ready to pay to the Plaintiff 6*l.* of *English* money, if he, the Plaintiff, had been there, and willing to deliver to the Defendant the said bills; and that neither the Plaintiff, nor any one for him, was then there to receive the said 6*l.*; and, that he has always since been ready to pay, and brings the same into Court; and concludes with traversing, that the markets were held in *London*; and also traversing, that the 19*l.* 16*s.* *Flemish*, were worth 14*l.* *English*. The replication avers that 19*l.* 16*s.* *Flemish* were of the value of 14*l.* *English*; and concludes to the country. Whereupon a jury *de medietate linguæ* is awarded. In an action of debt for rent (*b*), by the abbot of the monastery of *Holy Cross of W.*, the declaration shows a demise of a manor and lands for a year, rendering 40*l.* at *W.* aforesaid, at the four feasts of the year; that the Defendant occupied for the year; and that the 40*l.* is still in arrear to Plaintiff, *per quod actio accrevit;* and concludes, that Defendant has not paid, although often re-

(*a*) *Rast.* 158. *b.* (*b*) *Rast.* 175. *a.*

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quested. The Defendant pleads certain acquittances as to part, and levy by distress for the residue. The Plaintiff replies *non est factum*, as to the acquittances, and denies the levy by distress. In an action of debt (*a*) against executors, the declaration states that the testator, by his bill obligatory, acknowledged to owe to Plaintiff 17*l.* 10*s.*, to be paid in three half years, that is to say, 6*l.* 10*s.* at *Storebrich* fair next, and the rest at other fairs, averring when the fairs were held, and concluding, that testator and executor have not paid, although often requested. The Defendant pleads *ne unques* executor. The Plaintiff replies. The Defendant rejoins. The Plaintiff there had a verdict, and judgment. To an action of debt for rent (*b*), the Defendant pleads, that he, on the said day, &c., for the space of half an hour before sunset of the said day, was at the same common dining-hall of *Thavies* Inn, situate, &c. ready, and offered to pay the Plaintiff the said 3*l.* rent, which he was bound to pay on that day, according to the form and effect of the said indenture; and that neither the Plaintiff, nor any one authorised by him, was then there to receive; that he has always since been ready to pay, and brings the money into court. The replication states, that the Plaintiff receives the money, and for damages, protesting to the readiness and offer to pay, replies a subsequent demand and refusal (not alleged to be at the place). The rejoinder denies the demand. To an action of debt for rent (*c*), the Defendant pleads (after *oyer* of the writing) that he, on the day in the condition mentioned, for the space of an hour before sunset, and after, was at the said mansion-house in the said condition specified, ready to pay the said 40*l.*, according to the form and effect of the said condition; and that neither the Plaintiff, nor any one lawfully authorised by him, was then there to receive; *semper paratus*, and *profert in curiam*. The Plaintiff replies, that he was there to receive, and traverses that the Defendant was there ready to pay. The Defendant rejoins, whereupon issue is joined. In *Marshall* v. *Wisdale* (*d*), to an action for 10*l.* rent, the Defendant pleads a tender of 9*l.*, and that he paid the

(*a*) *Rast.* 322. *b.*
(*b*) *Thompson's Entries*, 159. pl. 167. et seq.
(*c*) 2 *Modus Intrandi*, *Pl. Gen.* 234.
(*d*) *Freeman*, 148.

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other 1*l.* for taxes. The plea was held bad, because he did not plead the tender at the place where the rent was agreed to be paid. The Court said, it could not properly be paid any where else. In *Crouch* v. *Fastolfe* (*a*), to an action of debt for rent, the Defendant pleads, that he was at the place on the day, from before sunrise to sunset, ready to pay, and that the Plaintiff, nor any one in her behalf, &c. was there to receive; *semper paratus*, and *profert*. It was held a good plea, though no tender was alleged. These precedents and authorities, with many others which may be found in our old books of pleadings, and especially in cases of rent, which the law makes payable upon the land, seem to me to be strong evidence of what the law is in cases of contract to pay money at a particular place; and to establish two propositions which may be considered as general rules, though, like other general rules, subject perhaps to exceptions under special circumstances. First, that a demand at the place is not a condition precedent to the creditor's right to sue for the money, nor, of course, necessary to be averred in his declaration. Secondly, that the Defendant may excuse himself, by pleading that he was ready to pay the money at the place appointed; but that, in such plea, he must show that he has always since been ready, and must bring the money into court. The same law appears to me to be applicable to the acceptances of bills of exchange such as this acceptance is, which I consider to be a contract by the acceptor to pay the money at the place by him expressed. I am aware that this opinion is inconsistent, not only with the cases of *Callaghan* v. *Aylett* (*b*), and *Gammon* v. *Schmoll* (*c*); but also with the opinions expressed by the Court of King's Bench in *Saunderson* v. *Bowes* (*d*), and acted upon by the same court in *Dickinson* v. *Bowes* (*e*); and also acted upon by the Court of Exchequer Chamber in *Bowes* v. *Howe* in error (*f*). The two first mentioned cases, were cases of bills of exchange accepted, payable at a particular place; the three latter were cases of promissory notes, expressed in the body of

(*a*) Sir *Tho. Ray.* 418.
(*b*) 3 *Taunt.* 397.
(*c*) 5 *Taunt.* 344.
(*d*) 14 *East*, 500.
(*e*) 16 *East.* 110.
(*f*) 5 *Taunt.* 30.

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them to be payable at a particular place; and, in all of them, a demand at that place was considered as a condition precedent to the holder's right to sue upon them. I have felt the weight of these authorities, and it has not been without much consideration that I have felt myself at liberty now to dissent from them. But, considering that the general question, upon which so much difference of opinion has prevailed, is now before this court of ultimate resort for a final decision, which must operate as a general rule in all future cases, it is very important, that that rule should be founded on true principles, and, as far as is consistent with such principles, that it may be practically convenient. For this reason I have ventured to enquire into the grounds of these decisions. In the cases which occurred in the Common Pleas, I do not find that the point on which my opinion is founded, (namely, that where money is to be paid, at a specified place, it is matter of defence, and, that it is therefore incumbent on the Defendant, to show that he was ready at the place to pay,) was fully brought before the consideration of the Court: no authorities, at least, appear to have been cited in support of it. In the case of *Saunderson* v. *Bowes*, in the King's Bench, which was followed by the cases of *Dickinson* v. *Bowes*, and *Bowes* v. *Howe*, with deference, I think, that the Court fell into a mistake in supposing, as they seem to have done, that the rule requiring the Defendant to show, by way of excuse, that he was ready with his money at the place appointed for payment, (which rule they admitted in the case of bond under penalty,) was confined to such cases where a penalty was to be excused, and where the Defendant was called upon to plead the condition, of which he wished to avail himself. I humbly apprehend that there is no such distinction; and that I have shown by the precedents and authorities before cited, that the same rule equally applies to the cases of single bills, without penalty; and indeed, as I conceive, to all cases where the contract is to pay money at a particular place. It may be suggested, that, if the doctrine, which I have ventured to express, be applicable to the acceptances of bills of exchange, it is extraordinary that no case has occurred, or, at least, that none has been cited, where such a plea has been pleaded by an acceptor. To this I should answer, that probably no case has occurred where an acceptor has been sued without a previous

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previous demand of the money, or, without such circumstances existing as evinced that he was not ready to pay. And this leads me to remark, (though I am aware, that convenience alone is not a legitimate ground of decision, unless it be consistent with law,) that to require the Defendant to aver and prove readiness to pay in the few, if any, cases, where, notwithstanding his readiness, he may be vexatiously sued, rather than to require the Plaintiff, in all cases, to aver and prove an unavailing demand, will, as I humbly conceive, be a more convenient, as well as a more just rule for both parties, and more merciful to Defendants themselves. For if, as the fact is, in almost every case of an action brought against the acceptor of a bill, the Defendant has failed to pay from mere inability; to require proof of the previous demand, will only add the expense of one more witness, sometimes brought from a distant part of the kingdom, to the burden, which the Defendant was before unable to bear: whereas, on the other hand, if an action, without previous demand, should ever vexatiously be brought against an acceptor, who was really ready with his money at the place appointed according to his contract, he, by pleading his readiness, and bringing his money into court, may discharge himself from damages and costs, and the Plaintiff will justly be punished for his vexation by the payment of costs.

I have one other observation only to make on this part of the case. It may be said, that unless the holder be bound to demand payment at the place appointed, he may demand it at some other place, where the acceptor is not prepared with funds. I answer, that, if such a case should occur, I think the acceptor would be entitled to a reasonable time to draw his funds to that place. For this, the case of *Halsted* v. *Vauleyden* (a), is an authority, where (the Defendant having by deed acknowledged that he owed to the Plaintiff 111*l.*, and covenanted that the same should be paid by *C.* at *Rotterdam*, in *Holland*, on the first demand that should be made,) it was held, on a special verdict, that the Plaintiff might make his demand at *Dort*, which is ten miles from *Rotterdam*, or in *England*; but, that in such case, the Defendant ought to have a reasonable time to pay, regard being had to the distance.

(a) 1 *Rol. Ab.* 443. *pl.* 5. 20.

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Richardson J. 3d Question.

In answering the third question proposed by your Lordships, I think it necessary to distinguish between a qualification as to time, and a qualification as to place; any qualification as to time, whether the time of payment be thereby accelerated or retarded, which the holder permits to be introduced into an acceptance without the concurrence of the drawer, must, I think, have the effect of discharging the drawer. I think it must have such effect, because it necessarily varies, and must be intended to prejudice his situation, as to the time when he may be called upon to pay on the acceptor's default, and as to the time when he must resort to his remedy over against the acceptor. As to place, I think it is not every qualification of place which may be introduced into an acceptance, without the privity of the drawer, that will necessarily discharge the drawer; but to produce that effect, I think the qualification must be such as must vary, and may be intended to prejudice his situation. For instance, if a bill drawn upon a person in the *Temple*, be by him accepted, payable at the banking-house of Messrs. *Child* and Co., at *Temple-bar*, this, I think, would not have the effect of discharging the drawer. But, if such bill were accepted, payable at *Dublin* or *Amsterdam*, this, if taken without the privity of the drawer, would, I think, discharge him; because it would necessarily vary, and might reasonably be intended to prejudice his situation, as to the time when he could receive notice of the acceptor's default, and as to his remedy over against the acceptor. It may be difficult to lay down prospectively a precise rule, applicable to all cases, for defining the degree of distance from the residence of the drawer, at which he may be permitted by the holder to appoint, by his acceptance, the place of payment, without discharging the drawer. I should say, that to produce that effect, the distance must be such, as would probably delay the drawer in his receipt of notice of the acceptor's default of payment, or throw some increased difficulty upon him in his remedy over against the acceptor.

4th Question.

In answer to the fourth question proposed by your Lordships, I think, that in the case put, *C.* might maintain an action against *A.*, upon the original debt, without first returning to *A.* the bill drawn by him, *C.* having first cancelled the qualified acceptance offered by *B.*, to which *A.* is supposed to have refused his consent. Such an acceptance, so offered

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offered by the drawee, but refused by the payee, because the drawer refuses his consent, is to be considered as no acceptance at all; the bill becomes a dishonoured bill, and consequently the payee has an immediate remedy against the drawer, either upon the bill, or upon the original debt.

Garrow B.

GARROW B. concurred entirely with *Best* J. and *Richardson* J., both in their opinions, and the reasons given by them for those opinions; and referred to them as containing his own views of the case; observing only, in addition, that it was well known in the mercantile world, that the Governor and Company of the Bank of *England* had determined to discount no bills which were not accepted, payable at a banker's.

Burrough J. 1st Question.

BURROUGH J. In answer to the first question proposed by your Lordships, I submit, that the usage and custom of merchants does not require, that the drawee shall accept a bill of exchange in any given form. He may accept it by parol, or in writing. He may accept it generally; and, if he does so, he is, in the language of some of the cases, generally and universally liable: Or, he may accept it specially; and, then, he is liable according to the tenor of the bill and his acceptance thereof. Whatever the acceptance may be, if an action be brought against the acceptor, the declaration must truly state the acceptance; for, the acceptance contains the terms, on which he has agreed to the bill. I am of opinion, that the acceptance is a contract which must be construed, as all other contracts are, according to the intention of the party contracting, to be collected from the nature and words of the contract itself. The acceptance, if special, binds him *sub modo*, and not generally. There is neither hardship or illegality in this. In the present case, the intention appears to me to have been to do away with the necessity and trouble of a personal application to him, upon the bill becoming due, and of his keeping money by him to pay it, but to substitute a much more convenient course in the first instance. No holder of a bill, when he goes to the banker's shop, expects to find the acceptor behind the compter: on the contrary, he knows he shall not find him there. On the face of this count, the bill is alledged to have been accepted according to the usage and custom of merchants: yet the doctrine of

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of the case of *Smith* v. *De la Fontaine*, and other subsequent cases is, that the acceptor, notwithstanding a special acceptance, is generally and universally liable. This is a doctrine to which I cannot subscribe. The effect of such doctrine is, that, notwithstanding a well-known place is pointed out where the money may be obtained, the holder shall be at liberty to arrest the acceptor the moment the bill becomes due, and to turn a special and qualified undertaking into a general one, having very different consequences. It seems, however, to be now conceded, that this doctrine cannot be supported. But, then, it is said, that this special qualified acceptance makes no difference as to the averments in the declaration, except as to the statement of the acceptance. As I understand the acceptance stated in this declaration, I am of opinion, first, that it imports that there is a fund in the hands of the banker to answer the amount of the bill; and, secondly, I say, that this acceptance means to impose and does impose on the holder an act to be done by him, namely, to present the bill at the bankers for payment: If payment is not made on application, the acceptor's contract is broken, and not till then. But the holder must state in his declaration the title to his action, which is, that the bill was presented and not paid, and so his cause of action has arisen against the acceptor.

The case of *Bishop* v. *Chitty* (a) in no way assists the case of the Defendant in error. The underwriting of the order for the payment of the money in that case, I admit, amounted to an acceptance, and it was, indeed, declared on as such: the possession of the bill with the order for payment of it were, in my judgment, sufficient to throw on the Plaintiff the burthen of proof, that he had presented the order, and could not obtain payment of it. It was there holden by Lord Chief Justice *Lee*, to be the Plaintiff's loss; for, he said, it was to all purposes a draft, which is always considered as actual payment when a reasonable time to receive it in has elapsed. *Smith* v. *Abbott* (b) is an instance of a conditional or contingent acceptance, and in which it was incumbent on the plaintiff to state in his declaration and to prove at the trial, that the contingency

(a) Str. 1195. (b) Str. 1152.

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had happened. The acceptance was "to pay when goods consigned to him," (and for which the bill was drawn) "were sold." The Court held, that the acceptance was within the custom of merchants; and said, that the plaintiff might have refused it. The Court said also, "it will affect trade, if factors are not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods. A man, who is drawn upon at ten days sight, may accept for thirty, though the other might protest the bill." So, in this case, I say, it will affect trade, if a man is, at all events, contrary to his intention, to be deemed to have accepted generally: or, if his acceptance in this form is to be so construed, as to make him liable to be held to bail as soon as the bill becomes due. The fallacy, in this case, seems to me to consist in supposing, that the acceptor has engaged for a personal payment at the bankers. This appears to me to be contrary to the intention and the effect of the acceptance, to be collected from the words of it. Suppose the acceptance to have been in this form. "Accepted to be paid by me, if, on application to Messrs. *Perring* and Co. my bankers, when the bill becomes due, it shall not be paid by them;" there is nothing in the usage and custom of merchants to show, that such an acceptance would not have been good. But, whether an acceptance be good or bad within the custom, if the party, who leaves the bill for acceptance, receives it back without objection, he must abide by it. If he cannot recover according to the custom, it is his own fault. The acceptor can only be liable to an indorsee on an acceptance within the custom. In my judgment, the acceptance in the case before the house is in effect such as I have supposed; that this was the intention of the party, I think there can be no doubt; the words of the acceptance appear to me to manifest it. In *Julian* v. *Shobrooke* (a), the Defendant had accepted a bill on account of the ship *Thetis*, when in cash for the ship's cargo. It appears in the report of that case, that the acceptance was so stated in the declaration, and that the Plaintiffs averred in his declaration (as I think he was obliged to do) that, on the day when the bill became payable, the Defendant was in cash for the said ship's cargo. This the Plaintiff must have been bound to prove at the trial; be-

(a) 2 *Wils.* 9.

cause

cause it was part of his case, and it consisted of matter in the affirmative. In the present case, the Defendant in error must contend, that, if the cause had gone to trial, on proof of the acceptance, he would have established a *prima facie* case; for he might have urged on the plea of *non assumpsit*, that the objection (if any) was on the record. As this record is, the question arises on a special demurrer. I am of opinion, however, that the declaration is substantially defective. First, because a material averment is omitted, namely, the presentment of the bill for payment at the bankers, Sir *John Perring* and Co., which is matter in the affirmative, and, I think, that it lay on the Plaintiff to aver it. *Secondly*, because the cases referred to in support of the assertion, that the answer was to come on the part of the Defendant below, do not support that assertion. The cases supposed were covenant to pay money at a certain place on a certain day: (*ex. gr.*) to pay to the Plaintiff in an action of covenant 100*l.* on the 1st of *August*, at or in the common dining-hall of *Lincoln's Inn*. It is said, that, in a declaration on such a covenant, the Plaintiff's breach is good, "that the Defendant did not pay the money on the day at or in the common dining-hall aforesaid, but neglected and refused so to do." I admit that this is so, but it is so, because the Defendant covenants to do the act personally to the Plaintiff at that place; and the breach is, that he did not do it at the day and place, but neglected and refused so to do. This is good in a declaration, which is to be certain to a certain intent in general; and it implies, that the Plaintiff was there ready to receive, — the parties having agreed to time and place. If this acceptance had amounted to an engagement by the acceptor to pay personally at Sir *John Perring* and Co.'s, the case alluded to might have had some weight. But this acceptance is not so, nor, from the language of it, can it be taken to be so meant; but, as appears to me, the contrary was intended, viz. that Sir *John Perring* and Co. the bankers were, in the first instance, to be looked to for the money; and that the acceptor was to be resorted to in case of nonpayment by them.

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I will now, shortly, advert to the cases more immediately applicable to the subject; and the weight of those cases appears to me to be in favour of the Plaintiff

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tiff in error. The first case, to which I have occasion to refer, is *Smith* v. *De la Fontaine* (*a*). In that case, Lord *Mansfield* is reported to have held, that the words accompanying an acceptance "payable at a particular place," or the words "payable at, &c." were not words restricting or qualifying the acceptor's liability; but rendering him generally and universally liable: and, that it was not necessary to prove a demand at the particular place in an action against such acceptor. If this was meant of an acceptance, by which the acceptor personally engaged to pay at a particular place, I should feel no objection to the observation: but, if it was meant to apply to cases wherein the acceptance has no such import, I do not think it law. The next case was that of *Saunderson* v. *Judge* (*b*), which does not affect the question in this cause. There the promissory note was in the ordinary form. It was made by one *Sharp*, and payable to *Wilkinson*, or order. At the foot of the note there was a memorandum, that he would pay it at the house of *Saunderson* and Co. The Court held that this memorandum was no part of the note. If it was no part of the note, the holder, who was indorsee, was not privy to it: it did not bind him, because it was not transferred to him by the indorsement of the note. In *Parker* v. *Gordon* (*c*), the bill of exchange was accepted as in the present case; and, there, the Court of King's Bench, consisting of Lord *Ellenborough*, Justices *Grose*, *Lawrence*, and *Le Blanc*, (Lord *Ellenborough* having nonsuited the Plaintiff) on motion to set aside the nonsuit held, that the Plaintiff, the holder, was bound to present it at the bankers within banking hours. They must have considered it as part of the acceptance. If it was no part of the acceptor's contract, the holder could not have been bound so to present it: but, on the contrary, he should have applied to the acceptor himself for the money. The next case in order of time is *Lyon* v. *Sundius* and *Shcriff* (*d*). The acceptance was of a bill of exchange, as here; Lord *Ellenborough*, in that case, appears to me to use expressions not warranted by law. He says, "how can you make three words, *at Hankey* and Co.'s more than a *memorandum*?" The answer

(*a*) Holt, N. P. C. 366. note.
(*b*) 2 H. Bl. 509.
(*c*) 7 East, 385.
(*d*) 1 Campb. 423.

appears

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appears to me to be, that they are more, for they are part of the acceptance. His lordship then says, "the acceptor of a bill of exchange is liable universally;" the observation on this is, that he is so, if he accept generally, but not otherwise; for his obligation and the extent of it must depend on the acceptance itself. His Lordship then proceeds to say, "this very point was brought before the Court some time ago, when the judges were all of opinion, that such words form no part of the contract, and did not require to be set out in the declaration." If I thought this to have been an opinion deliberately formed by that excellent and able man, I should have hesitated before I declared myself persuaded, that it is not tenable. It appears to me, that it cannot now be contended, that such words are no part of the contract of the acceptor. When his Lordship says, "this point was brought before the Court some time ago," I presume, he means to refer to the case of *Smith* v. *De la Fontaine*, in Lord *Mansfield's* time. That case was probably introductive of the confusion which has existed on this subject. The next case is *Ambrose* v. *Hopwood* (*a*), where the Court of Common Pleas held, that, in an action on an acceptance, like that in the present case, the declaration must aver, that it was presented at the place where the person, by whom it was made payable, resided. In a subsequent case (*b*) in this house, it was holden to be sufficient to alledge the bill to have been presented to the persons themselves. Still the case of *Ambrose* v. *Hopwood* shows it to have been the opinion of the Court of Common Pleas, that the declaration must aver a presentment consonant to the acceptance; and the acceptance throughout is treated as a substantial part of the contract. In *Callaghan* v. *Aylett* (*c*), the acceptance was nearly like the acceptance in this case. The bill was there accepted payable at Messrs. *Ramsbottoms*, bankers, *London*. The declaration alledged an acceptance generally. At the trial it was objected, that this was a variance; and, that there was no proof of a presentment at the place. A verdict was taken for the Plaintiff, and these points were reserved for the opinion of the Court. On argument, the Court of Common Pleas held, that this

(*a*) 2 *Taunt.* 61.
(*b*) *Huffam* v. *Ellis*, 3 *Taunt.* 415.
(*c*) 3 *Taunt.* 397.

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was a qualified acceptance, to which the holder (he having acquiesced in it) was obliged to conform, and directed a nonsuit. Then follows in order of time the case of *Fenton* v. *Goundry* (a). In that case the acceptance was in this form, "payable at *C. Sikes, Snaith,* and Co." And the bill was addressed to the defendant at "No. 54, *Lower Shadwell, Wapping.*" It seems, that, in this case, the idea of the expansion of the promise to pay first arose. One would think, there had been a precedent independent general engagement, and that something expansive was added to it. The acceptance is one act: to call it an expansion of the promise, is, in substance, to make it a general engagement, and pleadable as such. It is the promise itself. It is one entire engagement; and the legal effect of it is, "I accept or agree to this bill, but you must go *first* to *Sikes, Snaith,* and Co. for the money." This makes it a qualified or conditional engagement. In that case a learned person, who argued for the Defendant, says, "where something is to be done by both parties at the same time, the Defendant, who is sued for a breach of his part of the engagement, must show, that he did all that lay upon him to do, and that the Plaintiff did not perform his part, which prevented the Defendant's performance" (b). I conceive, the facts of that case do not warrant this observation; for the presentment is solely the act of the holder; and the payment is not to be made by the party himself, for no one expects to find the acceptor behind the banker's counter: therefore, there is nothing to be done by both parties at the same time; for the parties, from the nature of the engagement, are not to be present at the same time. This is an argument, which probably had much weight; but I conceive, that the foundation of it fails. In deciding the case, the Lord Chief Justice appears to have said (c)—"It has become a frequent practice, in order to avoid the inconvenience to the holder of not having his bill honoured, when he calls for payment at the party's ordinary place of residence, to intimate his other house of residence for the purpose, if I may so express it, which is at his banker's, where he engages, as it were, to be found at the usual hours of business." I am

(a) 13 *East.* 459.
(b) 13 *East.* 465.
(c) 13 *East.* 469.

satisfied,

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satisfied, that this observation is ill-founded. No one believes it to be the acceptor's place of residence, nor, that he will be at all found there. The truth is, it is to avoid the inconvenience of keeping funds in his own house, that he makes the bill, by his acceptance, payable by, or at his banker's, which is not his house of residence, nor considered as such; but, where he has cash or credit. It cannot but be observed too, that, there was floating in his lordship's mind, that the obligation to pay by the acceptor was general and universal: this is true of a general acceptance; but if it be urged as applicable to a special, qualified, or conditional acceptance, I cannot agree to it: for, though the party, who calls for the acceptance, may refuse to take it, if it be not general; yet, if he do accept it, and assent to its being special, he must pursue his remedy according to the terms of the contract itself: for, an acceptance is as much a contract, as is a policy of assurance or a charter-party. Both the other learned Judges, in that case, appear to speak with considerable doubt on the subject; the Court hinted at a further consideration of the question, for judgment *nisi* only was given; but, as the reporter says, no further notice was taken of it. After this case, in *Gammon* v. *Schmoll* (a), the Court of Common Pleas gave judgment on a question precisely similar to the present, on a full consideration of *Fenton* v. *Goundry*, and all the preceding decisions. That Court held, *first*, That the acceptance was a contract. *Secondly*, That the introduction in it of the words "Payable at *Batson*'s, *London*," qualified the contract; and, that it was a condition precedent. *Thirdly*, That the holder must show in pleading, that he has complied with it. One of the learned Judges (b), who concurred in this opinion, observed, that the reasons given in *Fenton* v. *Goundry* show, that the judges were very doubtful as to this point. The case of *Huffam* v. *Ellis* (which I have before alluded to) came before this house on error. The bill was accepted, payable at *Kensington*, *Styan*, and *Adams'*; and, it was averred in a declaration by an indorsee against the drawer, that the bill was presented to the house using the name, style, and firm of *Kensington*, *Styan*, and *Adams*. This house held, that this was a sufficient averment to satisfy

(a) 5 *Taunt.* 344. *S.C.* 1 *Marsh.* 80. (b) *Chambre J.*

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the words, "payable at *Kensington, Styan,* and *Adams.*" The case of *Bowes* v. *Howe* (*a*), is a case of great weight. It was subsequent to all the cases on this subject, which have been brought before the courts, except *Gammon* v. *Schmoll;* and that was in the following year. *Bowes* v. *Howe* was an action by one, who held a promissory note by assignment or indorsement against the makers. The note was made payable at *Workington Bank*. The declaration averred, that the Plaintiffs in error (the makers of the note) became insolvent before the action, and wholly declined and refused to pay it at *Workington Bank*. The Plaintiff below had judgment, which was reversed in the Exchequer Chamber. The Lord Chief Baron, Sir *Archibald Macdonald*, delivered the judgment of the Court. He held that the question was, whether the allegation in the declaration dispensed with the necessity of presenting the notes (for there were counts on many other notes) at *Workington Bank?* And, that it was clear that a demand was necessary unless dispensed with; and that the allegation was not sufficient to enable the Plaintiff below to maintain his action. The words at "*Workington Bank,*" were in the body of the note; the words "Payable at Sir *John Perring* and Co.'s" are, in the case before this house, in the body of the acceptance; and, I am of opinion, that there is no solid distinction between that which is incorporated in a note, and that which is incorporated in an acceptance. It is proper to advert to the case of *Head* v. *Sewell* (*b*), which arose before Lord Chief Justice *Gibbs* at *nisi prius*. He held, in the case of such an acceptance as the present, that it was not necessary to prove a presentment at the place mentioned in the acceptance; and, following up the language of some of the cases, said, that the acceptor is generally and universally liable. It seems to me to be most strange, after the cases in his own court, (one of which was not more than two years before) which were directly contrary to this opinion, that nothing further should have been done in this case of *Head* v. *Sewell*; that it should not have been brought before the Court. I am persuaded, that there must have been some circumstance in that case, which the reporter has not noticed. The case of *Richards* v. Lord *Milsington* (*c*), need only be mentioned shortly. That was

(*a*) 5 *Taunt.* 30. (*b*) *Holt N. P. C.* 363. (*c*) *Id.* 364. *note.*

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an action on a promissory note, before the same Chief Justice at *nisi prius*. His lordship said, "the words 'payable at *Bruce* and Co.'s' are not introduced in the body of the note, they are only inserted in the margin." This case, therefore, has nothing to do with the subject. I have adverted to all the cases which appear to be applicable to the case before the house; and the result is, that I am of opinion, that the bill of exchange in the first count of the declaration, being therein alledged to have been accepted according to the usage and custom of merchants, payable at Sir *John Perring* and Co.'s, bankers, *London*, the holder was bound to present it at that house, and to aver in his declaration that the same was presented at that house for payment.

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As to the second question proposed by your Lordships, it is not necessary to say more in answer to it, than that I am of opinion, that the acceptance is, in law, to be considered a qualified acceptance, that the bill shall be paid at the house of Sir *John Perring* and Co. bankers, *London*, and not as a general acceptance to pay the same, with an additional engagement or direction for the payment at that house. The acceptance is an entire contract; the holder who receives it, must take it as it is, (if he does not dissent from it,) and it must be construed as it was meant, if the intention can be discovered, and the words are sufficient to effectuate it. I feel no doubt as to the intention, and can discover no legal ground to prevent its being carried into effect.

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As to the third question proposed by your Lordships, I am of opinion that this must be considered, *first*, as to the time, *secondly*, as to the place. And *first*, as to the time; if B. accept a bill drawn on him at 3 months, and, by his acceptance, make it payable at 4 months, and thereby lengthen the time of payment, I think C. could not maintain an action against A., if this be done without his previous authority, or subsequent assent. And, if it was accepted payable at a shorter time than 3 months, without such authority or assent, I think the law is the same; because, the drawer might be liable to be called on sooner for the money than by the terms of his bill he had a right to expect. *Secondly*, as to the place; the question, as it appears to me, is, whether the variation is material? A general acceptance would have an implied relation to the drawer's place of abode. If

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the drawee accept it payable at his banker's in the same place, I am of opinion, that would not be material, and, that a drawee may, within the custom of merchants, well appoint another place of payment, if no material inconvenience to the holder, be thereby introduced.

Burrough J. 4th Question.

In answer to the fourth question proposed by your Lordships, I am of opinion, that, in the case comprehended in this question, C. the payee, could not maintain an action against A. the drawer, without delivering, or offering to deliver up, the bill to him: for, whilst the bill remains in C.'s hands, the drawer's remedy is suspended; and, when the drawer has the bill returned, it will appear that the drawee has not complied with the requisition in it, and the drawer is restored to his original situation. I do not think, that the debt owing from *B.* to *A.* in any way varies the case, as between *A.* and *C.*; for, *C.* receives the bill from *A.*; and, until *C.* has agreed to an acceptance materially different from the terms required by the bill, the transaction rests between *A.* the drawer, and *C.* the drawee.

Holroyd J. 1st Question.

HOLROYD, J. As to the first question proposed by your Lordships, I am of opinion, that, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir *John Perring* and Co., bankers, *London*, (that is to say, at the house of certain persons using in trade and commerce the names, style, and firm of Sir *John Perring* and Co. bankers, *London*,) the holder was not bound to present it at that house for payment, and to aver in the declaration that the same was presented at that house for payment.

As, in my way of considering the subject, the second question appears to me to be involved in the first, I shall state my opinions on the second question, before I give to your Lordships my reasons for either.

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On the second question, I am of opinion, that the said bill, having been so accepted as aforesaid, such acceptance is in law to be considered not as a qualified acceptance, to pay the same at the said house of Sir *John Perring* and Co. bankers, *London*; but, as a general acceptance to pay the same, with an additional engagement or direction for the pay-

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payment thereof at that house. Though the allegation in the declaration has not treated the acceptance simply as a general acceptance, but has stated the place of payment as a part of it; yet, as the allegation is, that the defendant accepted the bill *according to the usage and custom of merchants*, payable at Sir *John Perring* and Co., bankers, *London*, the first question appears to me to involve in it that which is proposed to us as the second question, namely, what is the effect of such acceptance *according to the usage and custom of merchants?* in like manner, as if the allegation had been simply that of a general acceptance, and, as if the question had arisen at the trial on the proof of an acceptance made payable at the place.

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In considering the first question, therefore, which will also dispose of the second, I shall, in the first place, consider, what is in law to be now deemed the effect of this acceptance, according to the usage and custom of merchants. If it be in law to be considered not as a qualified, but as a general acceptance *according to the usage and custom of merchants*, with an additional engagement or direction for payment at the specified house, it will stand, then, in my opinion, as if a mere general acceptance were stated in the declaration; and, in an action against the acceptor upon a mere general acceptance, although he may be ignorant in whose hands the bill is, and, consequently, know not to whom to go to pay it, yet the constant course of proceeding in such action has always been not to allege a presentment to the acceptor for payment, nor to prove it at the trial.

The history of the cases before that of *Callaghan* v. *Aylett*, and the grounds upon which those cases, as well as the case of *Fenton* v. *Goundry*, were decided, appear to me decisive upon the two questions. The doubts, which have arisen upon the effect of these acceptances, appear not to have been entertained, until after that point had been decided as a point free from doubt, both by judges and jury, for a period of nearly twenty-six years; those decisions taking as their basis the generally received and known usage amongst merchants, as to the effect of these acceptances, both previous, and up to, and during all that period of time. The case of *Smith* v. *De la Fontaine*, according to the note

which

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which I have of the case, was decided in the year 1785, first upon a trial by jury before Lord *Mansfield* (to whom, Lord *Ellenborough* says, in *Fenton* v. *Goundry*, the law of bills of exchange was as familiar as to any judge who ever sat on the bench), and, afterwards, by the whole Court of King's Bench, who were so clearly of opinion, that the making of the acceptance to be payable at Messrs. *Biddulph, Cox*, and Co.'s, was for the convenience of the acceptor; and, that there was no colour for the objection, that it was a special acceptance, and that the plaintiff ought to have proved an application at that house for payment in that action, which was an action against the acceptor; that the Court refused even a rule *nisi* to set aside the verdict for the Plaintiff and enter a nonsuit. This continued to be acted upon as the law, from thence till the year 1808, when the same point was determined by Lord *Ellenborough* in *Lyon* v. *Sundius*, which was a similar action on a like acceptance; Lord *Ellenborough*, considering the point as settled and without doubt, and that the additional words were nothing more than a mere memorandum, the acceptor being liable universally: and so this continued, with the exception of *Callaghan* v. *Aylett*, which I shall notice presently, till *Fenton* v. *Goundry* in *Easter* term, 1811, when, on a demurrer to a count like the present, the Court of King's Bench decided, that the acceptance was to be considered in law as a general acceptance with a mere intimation for convenience of the place designed for payment. Lord *Ellenborough* proceeds to decide the case upon the generally received opinion of the commercial world, as a matter quite clear of doubt, and upon what he had always understood to be the practice and doctrine concerning bills of exchange, since he had been familiar with them. The other judges of the Court, with the exception of Mr. Justice *Le Blanc*, who was absent from indisposition, also coincided with Lord *Ellenborough* in deciding upon the generally received opinion and practice which had long before prevailed. When the usage and custom of merchants respecting bills of exchange has been enquired into and ascertained, such usage and custom becomes matter of law, to be taken notice of as such by the judges; which is the reason why, though such usage and custom used formerly to be alleged in pleading

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ing as a fact, such allegation has for a long time been wholly discontinued.

Two cases, besides that of *Callaghan* v. *Aylett*, had indeed intervened, but they were both of them against the drawer, and appear to me to be not material to the present questions. One of them, *Parker* v. *Gordon* (*a*), is in the King's Bench; the other, *Ambrose* v. *Hopwood* (*b*), is in the Common Pleas. The acceptances were similar to the present: the one was a determination, that, *in order to charge the drawer*, a presentment at the place out of the usual banking-house hours was insufficient: and the other, that a presentment to the bankers, without saying at that place, was insufficient for that purpose; and, in neither case, did there appear to have been any presentment to the acceptor himself, personally, at all.

The case above referred to, of *Callaghan* v. *Aylett* (*c*), was a case which was decided by the Court of Common Pleas, (*Mansfield* C. J. being absent,) *Hilary* term, 1811, so lately as the very term next before the decision in *Fenton* v. *Goundry*; but the cause had been tried before him, and a verdict had been given for the Plaintiff, subject to the opinion of the Court as to the necessity of proving that the bill had been presented at the bankers for payment. As far as can be collected from both the reports of that case, the Court do not, on that occasion, appear to have had the case of *Smith* v. *De la Fontaine* laid before them; or to have considered, whether there was any known, established, declared, or generally received understanding or usage upon the subject amongst merchants. But they appear to have decided in that case, entirely upon the dry construction and effect of the acceptance, as a mere engagement to pay the bill at a particular house, named by the acceptor; treating it as a mere naked question of construction, arising from the words, independently of any enquiry as to the usage and custom amongst merchants respecting it. The case of *Gammon* v. *Schmoll* has, indeed, been since decided by the Court of Common Pleas, (*Mansfield* C. J. being, then also, absent,) in which that Court appear to have decided again,

(*a*) 7 *East.* 385.
(*b*) 2 *Taunt.* 61.
(*c*) 2 *Campb.* 549. *S. C.* 3 *Taunt.* 397.

upon

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upon the mere construction of the words alone, that the acceptance contained a condition precedent.

In *now* considering the question, whether the acceptance in the present case be a general or a qualified acceptance, it appears to me, that, upon a question of this nature, it is an important inquiry and consideration, whether there was any, and what generally-received, declared, or known usage and custom amongst merchants; more especially, if any such had been ratified and confirmed in judicature by judges and jurors; and that alone appears to me to be in itself decisive of the question, both upon the law and justice of the case. The parties thereto must, I think, be taken, in an instrument of a peculiarly commercial nature, both to have given and received this acceptance, (and consequently to have meant and understood it), according to such generally received, known, and declared understanding, and usage, and custom. After the decision of *Smith* v. *De la Fontaine*, both by the jury and the Court, especially when confirmed afterwards by *Lyon* v. *Sundius*, in the year 1808, it must, I think, be deemed, that there had been, upon the subject, both before and up to, and during that period, and until the determination in *Callaghan* v. *Aylett*, a generally received and known opinion, and usage, and custom among merchants, by which those acceptances were meant and taken as general acceptances, with a mere intimaton of a place for payment; and not as qualified acceptances, which might be refused: an opinion, usage, and custom ratified and confirmed by those judicial determinations; and continually acted upon both before and during that period, by the constant reception of all such acceptances, without any instance being brought forward of the refusal of any, as being a qualified acceptance. In a question, therefore, as to the effect of such an acceptance, (which is, really, only a question, what the parties meant and understood by the acceptance, which the one had given and the other had received,) it must, as it appears to me, be taken, that the one of them meant, and that the other understood him to mean, by the acceptance so given and received, nothing but what was the generally received understanding upon the subject, of persons most generally giving and receiving such mercantile instruments, namely, merchants; especially when that had been enquired into,

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ascertained, determined, declared, and confirmed by judicial decisions.

But, even if this supposed generally received understanding, usage, and custom, is to be considered as unascertained and uncertain, and that the effect of this acceptance is, for its construction, to be taken from itself alone; still, I cannot but think, that it is to be deemed only as a general acceptance to pay, with an additional engagement or direction for the payment at the specified house. In this view of the question, the legal principles and rules of construction, as well as the nature of an acceptance in itself, appear to me to be most material to be attended to.

Let us consider the nature of an acceptance in itself. The bill is brought merely for acceptance, that is to say, for a declared assent, that the acceptor will pay it according to the usage and custom of merchants. A mere declared assent by the drawee to pay, or anything amounting thereto, is, in law, an acceptance. By the first word, "accepted," which is the thing, which the very bringing of the bill requires the drawee to do, and which the drawer has a right to expect that the drawee will do, if he has effects in hand, which his acceptance of the bill implies: — I say, by the very first word, "accepted," the drawee has declared his assent to pay the bill; and, as I think, to pay it in such manner as the drawer has required, unless that which is added so qualifies this assent, as to be inconsistent with an assent to pay it as required. If it be not thus inconsistent upon the face of it, the holder is not to suppose, that it was meant to do away or alter the effect of what the acceptor had before written and signified; and, if the acceptor did so mean, he should have so expressed himself, or should have stated, that he would not accept the bill as required, (that is, to pay it according to the usage and custom of merchants,) but that, though he would not so accept it, he would engage to pay it at such a particular place, if the holder would take that engagement.

The words of the acceptance are those of the drawee only, and not of the drawer or of the holder, and are to be taken, although according to the intent, yet where that is not sufficiently ascertained, most strongly against the person using those words. The maxim of law, *verba fortius accipiuntur contra proferentem*; and Lord *Bacon's* observations thereon,

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thereon, appear to me very applicable to this case, supposing this is to be considered as a mere question of construction. He says that this rule "is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and, secondly, because it makes an end of many questions and doubts about the construction of words; for, if the labour were only to pick out the intention of the parties, every judge would have a several sense; whereas this rule doth give them a sway to take the law *more certainly* one way (a)." This rule, I think, requires the drawee, especially where it is to defeat in any degree the rightful expectations of the drawer, that the bill shall be unqualifiedly accepted as he has drawn it; and where the drawee has, in the first instance, declared his assent to pay it, if he meant to qualify or do it away, or alter it in the whole, or in part, or to clog that which is yet absolute, with any condition not beneficial either to the drawer or to the bill-holder, this rule, in my opinion, requires the drawee, in such case, to use, in addition, such words as clearly and unequivocally express or show such qualification, alteration, or condition. If the acceptance in question be considered as qualified, it must be by construing it, as if the drawee had inserted, what he has omitted, the word "only;" and what, if he so meant, the rules of construction, I think, require that he should have stated. The words, "Payable at Sir *John Perring* and Co.'s, bankers, *London*," may mean, either that the bill *may* be paid there, or an intimation that it *will* be paid there, (that is, if the holder bring it there); or it may be intended as an obligation binding also upon the holder, that it *shall* be paid there, and there only. But if the writer had meant the last, I think that, in order to bind the holder to consider that he did so mean, he should so have expressed himself.

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For these reasons, I am of opinion, that the acceptance in question, so as aforesaid alleged in the declaration, is to be considered, not as a qualified, but as a general acceptance to pay, with an additional engagement or direction for the payment thereof at the specified house; and, consequently, that the holder was not bound to present it at that house for

(a) Reg 3.

pay-

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payment, and to aver, in the declaration, that the same was presented at that house for payment.

But, supposing that this acceptance be to be considered as a qualified acceptance to pay the bill at the specified house, still the first question proposed to us by your Lordships, involves a further question; for it would not, in my opinion, from thence follow that the holder was bound to present it at that house for payment, and aver in the declaration that it was so presented; for I still think, that the holder would not, even in that case, be, by law, bound so to present it, or so to aver in the declaration.

The acceptance, even taking it to be a qualified acceptance, is still, I think, an undertaking to pay the bill at a particular time and place, absolutely and at all events, and not subject to any *expressed* or implied condition, which must previously be performed by the holder. Upon a promise or undertaking, either to pay a bill of exchange or money, or to do any other particular act, whether at a particular time and place or not, the very non-feasance alone is a breach of the contract, and the promisee need do no more in support of his action for such breach than to prove the promise: the non-feasance being a negative, the feasance, or that which in law is an excuse for it, is matter purely of defence, and the *onus probandi* thereof lies upon the Defendant. The person, therefore, so promising or undertaking, in order to defend himself, must either establish, that he has done the thing according to his engagement, or he must excuse his non-performance. It is not sufficient for a Defendant in his excuse to say, that the Plaintiff was not present at the time and place to demand and receive the money; but he must, in order to defend himself, allege and prove, that he did all in his power towards the performance, and that his not doing more was owing to the refusal or default of the Plaintiff. He must establish either a tender and refusal, or that he, the Defendant, was ready at the time and place to pay, but that the Plaintiff did not come, nor was present to receive. The circumstances excusing the non-performance, and throwing the fault on the Plaintiff, are matters in defence. This appears, I think, by Lord *Hobart*'s opinion in *Baker* v. *Spain* (a), and by the resolution of the Court of

(a) *Hob.* 8.

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Common Pleas, there cited, in *Busby*'s case, as to the payment of rent, which is payable on the land. So *Littleton* says (*a*), "Also upon such case of feoffment in mortgage, a question hath been demanded, in what place the feoffor is bound to tender the money to the feoffee at the day appointed, &c. And some have said upon the land so holden in mortgage, because the condition is depending upon the land. And they have said that, if the feoffor be upon the land there ready to pay the money to the feoffee at the day set, and the feoffee be not then there, then the feoffor is quit and excused of the payment of the money; for that no default is in him. But it seemeth to some that the law is contrary, and that default is in him, for he is bound to seek the feoffee, if he be then in any other place within the realm of *England*." The difference of opinion, there, was upon this point; *viz.* whether the mortgage-money was to be paid at a particular place, *viz.* upon the land, or not; but, in either case, whether it was to be *there* paid or not, the feoffor, who was to pay the money, was bound to do all in his power towards his performance, before he could be excused for his non-performance. *If no time be fixed* for the performance, then, indeed, the obligor, who is to pay the money at a particular place, is to do more, (and this doctrine should be remembered when the case of *Saunderson* v. *Bowes* comes to be considered); he must, according to *Co. Litt.* (*b*), "give the obligee notice, that, on such a day, at the place limited, he will pay the money, and then, the obligee must attend there to receive it; for, if the obligor then and there tender the money, he shall save the penalty of the bond for ever." Lord *Coke* then adds; "The same law it is, if a man make a feoffment in fee upon condition, if the feoffor, at any time during his life, pay to the feoffee 20*l.* at such a place certain, that then, &c. In this case the feoffor must give notice to the feoffee when he will pay it, for, without such notice as is aforesaid, the tender will not be sufficient." In both these cases, therefore, in order to save the bond or feoffment, the obligor and feoffor must attend and be ready with the money at the place, though the obligee or feoffee be absent; for the tender, of which he there speaks, is a tender (or rather what he calls a ten-

(*a*) *Litt. s.* 340. (*b*) 211 *a.*

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a tender), though the obligee or feoffee be absent; for he is speaking of a tender, which would not be an excuse without such notice, which is, therefore, a tender by the one in the absence of the other; and he immediately adds, "but, in both these cases, if, at any time the obligor or feoffor meet the obligee or feoffee at the place, he may tender the money." The forms of declaring, not only upon awards, but upon other instruments for the nonpayment of money at a particular place, are confirmatory of this doctrine. In *Rastell's* Entries are three precedents; two in debt on bills obligatory for money to be paid at particular marts or fairs (*b*), and the other for rent, payable at a particular place on particular feasts (*c*). The declarations did not contain any allegation of presenting the bills for payment, or any demand of the money at the marts, fairs, or place; but to one of those declarations, one upon some of the bills obligatory payable at different marts or fairs, the Defendant pleaded, that he was at the fairs ready to pay the Plaintiff, if the Plaintiff had been there, and would have delivered to him the bills aforesaid, and, that neither the Plaintiff, nor any for him, was then there to receive the same, with an allegation that he has been always since ready to pay, and a *profert* of the money into court. A bill of exchange, in an action against the acceptor, stands, I think, upon the same footing as a bill obligatory, or any other engagement for the payment of money, so far as regards the necessity of alleging in the declaration, or of proving at the trial, a presentment of the bill or a demand of the money. In an action against the acceptor, where he accepts generally, such allegation is never made, nor such proof required or given: though such a presentment is, no doubt, usually made *in fact* in such cases, before the action is brought, yet, the nature of the instrument itself (*viz.* a bill of exchange) has not rendered such an allegation or proof necessary, except where the action is brought to charge the *drawer* or indorser. The nature of the instrument, therefore, cannot, as it seems to me, make such allegation or proof more necessary where the acceptor adds a place for payment, than in other cases where the obligor or promisor adds a place for payment.

(*b*) *pp.* 158 & 322.

(*c*) 175.

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In either case, such allegation or proof is, I think, not requisite on the part of the Plaintiff; but, if the Defendant or his bankers, or any one for him, had his money ready at the time and place, and would have paid it if the bill had been then and there presented for payment, it is matter of defence, and may be pleaded by him; which removes, I think, the hardship and mischief which, it is supposed, may result from not requiring an allegation and proof of presentment for payment at the specified place to be made and given by the Plaintiff. Independently of the question of general or qualified acceptance, Lord *Ellenborough* and my brother *Bayley* in *Fenton* v. *Goundry*, both of them acceded to and confirmed this reasoning, as will be seen in 13 *East* (a). Their opinions, in that case, upon this point, appear to me to be material in showing, that the case of *Saunderson* v. *Bowes*, which was determined by the same judges very shortly afterwards, was determined on grounds not at all inconsistent with their opinions in their decision in *Fenton* v. *Goundry*. My brother *Bayley*, too, upon another occasion, at *Nisi Prius*, in *Hilary* term, 1809, in *Wild* v. *Rennards* (b), held the same doctrine, that if a promissory note is made payable at a particular place, in an action *against the maker*, there is no necessity of proving, that it was presented there for payment; and, in *Michaelmas* term 1810, in *Nicholls* v. *Bowes* (c), Lord *Ellenborough* held the same. But, it is said, that the decision in *Saunderson* v. *Bowes* (d), in *Michaelmas* term, 1811, by the Court of King's bench, and the decision of *Bowes* v. *Howe* (e), in *Trinity* term, 1813, by the Court of Exchequer chamber, which is founded thereon, are inconsistent with this doctrine. The above precedents in *Rastell* were not known or, at least, not brought forward in either of those two cases; and, if those two cases were not distinguishable from the present, but were so much in point as, at first, they may appear, it might be for consideration, whether those cases were not still open to a revision, like the decisions which for a time prevailed in favour of actions upon legacies, and of actions against femes covert with separate maintenances. But, when those two

(a) 470 & 472.
(b) 1 *Campb.* 425. *note.*
(c) 2 *Campb.* 498.
(d) 14 *East.* 500.
(e) 5 *Taunt.* 30.

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cases come to be looked at and considered, they are, as it appears to me, very distinguishable from the present, and also from *Fenton* v. *Goundry*, on this very point. In the present case, and in *Fenton* v. *Goundry*, the instrument declared on, a bill of exchange, was payable *at a certain time*. In *Sanderson* v. *Bowes*, and in *Bowes* v. *Howe*, the instrument declared on (a promissory note) was *not payable at a particular time*, but generally, entirely at the pleasure of the holder of the note, and so Lord *Ellenborough* observes (*a*), where he distinguishes *Sanderson* v. *Bowes*, from cases where money was to be paid, or something to be done *at a particular time*, as well as place. The cases of *Sanderson* v. *Bowes*, and *Bowes* v. *Howe*, were both cases of promissory notes of the *Workington* bank, payable on *demand* to bearer at the *Workington* bank. The notes being made payable to bearer, not at any specific time, but merely *on his, the bearer's demand*, the promisers could not comply with the above-mentioned rule laid down in *Co. Litt.* (*b*), of giving notice when they would pay the money at their bank, as they could not know who the bearer was, *till* the money was *demanded*. Nor was it to be paid but *upon demand*, which might, therefore, be deemed a condition precedent, quite consistently with my reasoning, and also, with Lord *Ellenborough*'s and my Brother *Bayley*'s, as applicable to cases where the money was to be paid at a time and place certain; and, if the demand thus became in those two cases a condition precedent, the place as well as time of the demand must necessarily form a part of that condition, and may require to be averred, as it was in those two cases decided.

For these reasons, therefore, I think, even if the acceptance as stated in the first count be to be considered as a qualified acceptance, that the holder was not, in the present case, bound to present it at the house for payment, or aver in the declaration that the same was so presented.

3d Question.

In answer to the third question proposed by your Lordships, I think, that if *A.* draw a bill upon *B.* in favour of *C.* for 100*l.*, and *C.*, without the previous authority or subsequent assent of *A.*, take an acceptance for the bill for the whole of the 100*l.*, but an acceptance qualified as to the

(*a*) 14 *East*, 504. (*b*) *Co. Litt*, 211. *a.*

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time or place of payment, *C.* could not maintain an action *upon the bill* against *A.*

In the case put by this question, the drawer has a right, I think, or at least may be considered as having reason to expect, either that his bill, if accepted, will be accepted to be paid in such manner as he has required, that is to say, according to the tenor and effect of the bill, and the usage and custom of merchants; or, that due notice will be given by the person taking the bill from him, according to such usage and custom, in case the bill be not so accepted. He *may* be injured, if the bill be not so accepted, as he has required, (*primâ facie*, at least, it is, I think, to be so considered); and, in default of such acceptance, he has a right, I think, to due notice of such default, in order that he may take such steps as he may think proper to avert such possible injury. The holder may either receive or refuse a qualified acceptance. If he refuse, he must give due notice; and, if the bill be a foreign one, he must also protest it, in order to charge the drawer. If he do not refuse, but do receive the qualified acceptance, in that case, by assenting to the qualifications imposed by the acceptor in varying the time and place, he becomes party to a fresh and different contract with the acceptor, to which the drawer was neither party nor privy: the contract is an entirely new one, assuming a new shape; the bill is converted into, and becomes a different or new bill, having a different tenor and effect from the old one, *viz.* such as the qualifications of the acceptance, either as to time or place, have engrafted into it. *C.*, by taking a different security, *viz.* this qualified acceptance, instead of having the one which the drawer had a right, or had reason to expect, and which *C.* was to require should be given him, has, I think, no right to maintain an action against the drawer upon this bill, the nature and effect of which has been altered by his having taken this qualified acceptance of it. In *Boehm* v. *Garcias* (*a*), (sittings after *Michaelmas* term, 1807,) it was held by Lord *Ellenborough*, that the drawer has no right to vary the acceptance from the terms of the bill, unless they be unequivocally and unambiguously the same; and, therefore, where an action was brought against the drawer on a bill

(*a*) 1 *Campb.* 425. *note.*

drawn

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drawn at *Lisbon*, payable in *effectivè*, and not in *Vals reals*, where the drawers offered to accept it, payable in *Vals denaros*, (another sort of currency, which was refused,) Lord *Ellenborough* held, that the Plaintiff had a right to refuse this acceptance, though the Defendant proposed to shew, that *Vals denaros* were sufficient to answer what was meant by *effectivè*; and wherever the holder may refuse the acceptance by reason of its being qualified, (as he may, I think, wherever the same is qualified, either as to time or place,) he cannot, I think, if he take the acceptance, sue the drawer upon the bill.

4th Question.

In answer to the fourth question proposed by your Lordships, I think, that if *B.* was debtor to *C.* in 100*l.*, previous to his so drawing upon *B.*, in favour of *C.*, to the amount of 100*l.*, *C.* could, upon *A.*'s refusing his assent to an acceptance, qualified as mentioned in the third question, maintain an action upon the original debt against *A.*, without delivering to *A.* the bill so accepted; in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100*l.*

The bill itself, having been dishonoured, has become no satisfaction for the original debt; the right of action upon the original debt, therefore, remains: and though, if *A.* pay or tender to *C.* the original debt, with the expences, &c. incurred upon the dishonoured bill, he will be entitled to have that bill delivered up again to him; yet, until *A.* has so done, the right to the bill, as it appears to me, which was given by him to *C.* as a security for, or in order to discharge that debt, remains in *C.*, who may, I think, bring an action, either upon the original debt, or upon the bill; or may bring an action including both those causes of action, in case they be of such a nature as to be capable of being joined together in one action. The original debt is not extinguished, but the right of action upon it remains, or is revived by reason of the dishonour of the bill; and *C.*, I think, has a right to retain the bill, which was given to him as a security, or for the discharge of his debt, and to use it either as a ground of action upon itself, or as a medium of proof for establishing his original debt: and the circumstance of *B.*'s being also indebted to *A.* in a like sum of 100*l.*, appears to me to make no difference as to *C.*'s rights of action; for *A.*, only by doing what by law he is bound to do, (namely, by payment of his debt, &c. to *C.*,) may entitle himself to the possession of the bill, and

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thereby avoid any injury, which he may, otherwise, sustain by the want of it in seeking his remedy against *B.* for the recovery of that debt.

Park J. 1st Question.

PARK J. With respect to the first question proposed by your Lordships to the Judges, I have no difficulty in stating it to be my humble opinion, that, as the bill of exchange now under discussion is alleged to have been accepted according to the usage and custom of merchants, payable at a particular banker's in *London*, the holder was bound to present it at that house for payment; and to aver in his declaration, that the same was presented at that house for payment.

To come to that conclusion, it appears to me to be only necessary to consider, who the parties to the contract are; and what contract the defendant on this record has entered into. The Plaintiff, or the payee, it is true, originally took a bill drawn upon the Defendant generally: but, when the Defendant had that bill presented to him for acceptance, he said by his acceptance, I do not choose to enter into this general engagement, for, my avocations may, at the time when the bill shall become due, call upon me to be in some distant part of the kingdom; and, therefore, both for your convenience and mine, I will specially accept it, payable at a particular banker's, or where my strong box or money is; and there you shall go for your money, and not follow and arrest me at a place where I have none: this is the defendant's contract. I admit that the holder might refuse to take such an acceptance; but, having taken it, can he enforce the contract against the contractor, without showing, that the contractor has not complied with his own conditional acceptance? May not the acceptor justly say, if the holder should attempt to enforce it contrary to the acceptor's engagement, *non hæc in fœdera veni?* I think he may; for, that the acceptor has a right to make a special acceptance differing from that which the drawer had wished to impose upon him, as to time, place, or amount, is admitted by those who argue for the Defendant in error. This has ever been considered as law from the time of *Marius*, who wrote in the 16th century on bills of exchange. (*a*)

(*a*) *Mar.* p. 17. 4th ed.

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The law upon these points, both as to the right of the drawee to make a special acceptance, and, as to the right of the holder to refuse it, is well stated, as your Lordships will find, in *Petit* v. *Benson*. (*a*) If, then, the drawee may refuse to enter into any other than a special acceptance; when he has made it, and it is received by the holder, surely, it becomes as much the original contract of the acceptor, as if he had written a promise to pay on certain conditions; or had promised to pay at a certain banker's, and no where else. The true sense of the case seems to be, and the principle is, that, whenever the place, at which the contractor is to perform it, forms a part of his express contract, and the duty is not merely collateral to it, it is necessary both to aver and prove a failure in that precise point on the part of the Defendant. Thus, in 1 *Rolle's Abridgment* (*b*), it is said, " If a place of payment is limited by the condition, the party is not bound to pay in any other place." Here, the duty is created by the instrument itself, with certain limits and qualifications. No duty, to be perfected by the acceptor, arose anterior to the very instrument itself; and the acceptor can only be answerable to the extent of his engagement, by his qualified acceptance.

If we were to speak of the convenience of this or that practice, there can be no question, that it would be most convenient, that the presentment of the bill at the place where it is made payable should be deemed a condition precedent; for, it would be very inconvenient, that acceptors, such as the original Defendant, should be made liable to answer every where, when it is notorious that they have made provision at a particular place, where alone they engage to pay. There is no antecedent duty as against the Defendant, save that arising on the bill; and, therefore, the instrument or bill must be looked at for the purpose of seeing what the duty is.

I do not think, my Lords, that this case has been fitly compared to the case of bonds; for, there, the penalty creates the debt, and the party is liable upon it, but is to discharge himself from the penalty by bringing himself within the terms of the condition: that, therefore, must be

(*a*) *Comb*. 452.

(*b*) *Tit. Condition*, p. 444. l. 7. & p. 445. l. 52.

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matter of defence. But, where a suit is in *assumpsit* upon a contract, the plaintiff must show, that he has done every thing which lay upon him to do, in order to bring himself within the contract, and entitle him to sue upon it. Now, here, by the terms of this acceptance, a promise is made by the acceptor to pay at *Perring* and Co.'s; the Plaintiff, who sues, then must bring himself within those terms by showing, that he made a demand at the place where the Defendant said he would pay; and he cannot be made liable beyond the extent of his contract. Where a defendant contracts generally to pay a sum of money, he is liable to a creditor every where: but, where a person binds himself to pay at a particular place, he is not liable at any other place, till default be made at the particular place. For, otherwise, suppose a bill drawn upon one just before going the circuit, (and this case is put by one of the most learned judges who ever adorned the Court of Common Pleas, I mean Mr. Justice *Chambre* (a),) which will fall due during the absence of such drawee; such a person living in chambers leaves no servant on his departure, excepting, perhaps, a laundress; what can be done in such a case, except to deposit the money with a banker, and make the bill payable at that banker's? Otherwise such person would be liable to be arrested at any place in the course of his journey, where he might have no money, which, indeed, he would be the less likely to have after making provision at his banker's. I agree with that learned judge, that it is a great convenience to the public to maintain these special acceptances.

But, it is said at the bar, if you can show that you had your money at your banker's, you would have a complete defence. Is it, then, no vexation to be causelessly arrested? Is a law-suit no vexation? Is it nothing to be 20l. or 30l. out of pocket, though you gain your cause? And this evil is only met by the trifling inconvenience of an obligation on the Plaintiff to call a witness to prove a presentment. Indeed, if we speak of inconvenience, it is all the other way; for, instead of the trifling inconvenience arising to a holder from the necessity of calling one witness to prove a presentment, every banker must, if the other view of the case be adopted, keep a number of clerks to go daily to all parts

(a) In *Gammon* v. *Schmoll*. 5 *Taunt*. 350.

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of the town, for the purpose of receiving payment of bills. Nay, so greatly was this inconvenience felt, that your Lordships are probably aware that the Bank of *England* will not discount any bill that is not payable at a banker's.

But we have been told at the bar, that the weight of authority is against the Plaintiff in error. Let us examine the cases, and see whether the decisions in the Court of King's Bench, and one or two at *nisi prius*, before Lord Chief Justice *Gibbs*, carry with them the same weight of reason as those decided by the Court of Common Pleas sitting in bank; or, whether the Court of King's Bench has, in this respect, been consistent with itself; a mode of discussion, which I can with much more satisfaction recommend to your Lordships' adoption, than a consideration of the weight due to individual judges, all of those who are concerned in these decisions being most highly respectable.

The first case immediately applicable to this is that of *Smith* v. *De la Fontaine*, of which there is a short note in my Brother *Bayley*'s Treatise on Bills of Exchange (*a*): however, a more full account is given of it in a note to Mr. *Holt's nisi prius* cases (*b*), which is taken from a manuscript of my Brother *Holroyd;* and there seems no doubt, that in 1785 Lord *Mansfield* at *nisi prius*, and the Court of King's Bench, afterwards, decided, that words similar to those here used were not words restricting or qualifying the acceptor's liability, but rendering him liable generally; and that it was not necessary to prove a demand at the particular place in an action against the acceptor. But how has this been followed up? The first case is that of *Lyon* v. *Sundius* (*c*), a mere *nisi prius* opinion, before the decisions of either *Callaghan* v. *Aylett*, or *Fenton* v. *Goundry*. Then came the case of *Fenton* v. *Goundry* (*d*), in which the Court undoubtedly held that doctrine, which is now under discussion; and which treated an acceptance like the present not as a conditional acceptance, but as a mere expansion of the promise to pay. But how is that consistent with the doctrine laid down in *Parker* v. *Gordon* (*e*), by two of the judges (*f*), who

(*a*) *p.* 129. *note b.* 3d ed.
(*b*) 366.
(*c*) 1 *Campb.* 422.
(*d*) 13 *East.*
(*e*) 7 *East*, 385.
(*f*) *Lord Ellenborough C. J.* & *Grose J.*

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were parties to the decision in *Fenton* v. *Goundry*? *Parker* v. *Gordon* was an action against the drawer; and I, therefore, do not quote the case as an authority, except to show that such words as these were considered as a special acceptance. "If a party (says Lord *Ellenborough* in the last-mentioned case) choose to take an acceptance at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly." And, in *Elford* v. *Teed* (*a*), his Lordship says that the case of *Parker* v. *Gordon* was conformable with the doctrine which he had usually held. *Lawrence* J. says, in *Parker* v. *Gordon*, "The party might have refused to take the *special acceptance*; but if he choose to take the acceptance in that manner, *payable at the banker's*, does he not agree to take it payable at the usual banking hours?" And *Le Blanc* J. says, in the same case, "If a party will take an acceptance, payable at a banker's, he must present it at a proper time, according to the known method of conducting the banking business; otherwise the greatest inconveniences to trade would ensue."

Two very modern cases have been quoted to your Lordships to show, that Lord Chief Justice *Gibbs* concurred with the decision of the Court of King's Bench in *Fenton* v. *Goundry*; namely, the cases of *Head* v. *Sewell*, and *Richards* v. Lord *Milsington*. (*b*) I will speak of *Head* v. *Sewell* first. It is sufficient to observe, that it was only a *nisi prius* case: next, it is so singular a case, that, either the note is incorrect, or the opinion of the Lord Chief Justice is not delivered with that very learned person's usual accuracy and precision. For, in the year 1816, he begins his observations by saying, that, after 35 years' experience, he had never known the objection to prevail, and, therefore, could not admit the necessity of the proof. What? had he not known of the case of *Callaghan* v. *Aylett*, decided in 1811, 5 years before, in the Common Pleas, by Mr. Justice *Heath*, Mr. Justice *Lawrence*, and Mr. Justice *Chambre*, as eminent persons as ever sat on that bench; and which case, in consequence of its having been much opposed the following term in *Fenton* v. *Goundry*, made them the common talk in *Westminster Hall*? Had he not

(*a*) 1 *M.* & *S.* 28. (*b*) *Holt*, *N. P. C.* 363.

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heard of the case of *Gammon* v. *Schmoll*, then quoted to him, and decided two years before, in the very same court by his then colleagues, Mr. Justice *Heath*, Mr. Justice *Chambre*, and the very learned person who afterwards succeeded him in the Chief Justiceship, in both of which cases the objection prevailed? And then again, though his Lordship is stated to have said, that he never knew the objection prevail, he concludes by saying, he knows there are conflicting cases. The other case of *Richards* v. Lord *Milsington* he decides that he may preserve his own consistency in a former case of *Price* v. *Mitchell* (*a*): but, upon looking at that case, it will be found a mere memorandum at the foot of a note, which never was held to be a condition, but a mere *memorandum* or direction. I, therefore, do not consider these cases as adding much weight to the authority of the King's Bench upon this occasion.

But I find the King's Bench in *Sanderson* v. *Bowes* (*b*), which was confirmed by an unanimous judgment in the Exchequer chamber (*c*), deciding diametrically opposite to the case of *Fenton* v. *Goundry*: and every word of the judgment of that great and eminent judge Lord *Ellenborough* is, in my mind, conclusive in favour of the plaintiff in error. Agreeing, as I do, with the learned editor of the Treatise on Bills of Exchange (*d*), that it is difficult to reconcile in principle with the case of *Sanderson* v. *Bowes*, that of *Fenton* v. *Goundry*, and *Sanderson* v. *Bowes*, being the last in decision, ratified by the decision of the twelve judges of *England*, and most agreeable to good sense, reason, and convenience, I think that it ought to prevail. The only difference between *Sanderson* v. *Bowes* and this case is, that *Sanderson* v. *Bowes* was an action against the maker of a promissory note; this case is against the acceptor of a bill of exchange: but I need not inform your Lordships, that the Courts in *Westminster Hall* have long thought the analogy between notes and bills so strong, that the rules established as to one ought also to prevail as to the other; *Heylyn* v. *Adamson* (*e*), *Brown* v. *Harraden* (*f*), fully prove this position. Then let us read the case of *Sanderson*

(*a*) 4 *Campb.* 200.

(*b*) 14 *East*, 500.

(*c*) *Bowes* v. *Howe*, 5 *Taunt.* 30.

(*d*) *Bayley on Bills*, 185. note 1. 3d ed.

(*e*) 2 *Burr.* 669.

(*f*) 4 *T. R.* 148.

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v. *Bowes;* and if "bill" be read for "note," is not every word of Lord *Ellenborough's* luminous reasoning decisive of the present question? (Here the learned Judge read the case and judgment in *Sanderson* v. *Bowes*, observing that in that case the Court of King's Bench held presentment at the banking-house necessary.) *Bowes* v. *Howe* (*a*) contains the affirmance of this proposition, though there was a reversal upon another point in that particular cause. And, in conformity to that opinion, Lord *Ellenborough*, in a subsequent case of *Roche* v. *Campbell* (*b*), held, that it was a fatal variance in a declaration not to state that the note was payable at a particular place, where the note was so payable. And his Lordship's language is peculiarly emphatical and applicable to this case, for he says, "This declaration represents the promissory note as containing an absolute and unqualified promise to pay the money. But, by the instrument produced, the maker only promises to pay upon the specific condition that the payment is demanded at a particular place. We have lately held (alluding to *Sanderson* v. *Bowes*) that, where the place of the payment is mentioned in the body of the note, it forms a material part of the instrument." So, here, the acceptor only undertakes to pay upon the specific condition that the payment is demanded at a particular place: this, and no other, is the contract of the acceptor.

Having thus shown the inconsistency of these decisions, and that *Sanderson* v. *Bowes* has not only had the judgment of the King's Bench in favour of that opinion, which I presume to deliver to your Lordships, but the confirmation, as to this point, of the whole Exchequer Chamber, can I hesitate in saying, that the strong current of authority is in favour of the Plaintiff in error, when I add, the authority of Judges *Heath*, *Lawrence*, and *Chambre*, in *Callaghan* v. *Aylett*, declaring that, doubtless, there may be a qualified acceptance of a bill which a holder is not bound to receive, but, that if he acquiesce in it, he must conform to the terms of the acceptance; and the further authority of Judges *Heath*, *Chambre*, and *Dallas*, in *Gammon* v. *Schmoll*. Mr. Justice *Heath* (*c*), treats it as a condition precedent, which

(*a*) 5 *Taunt.* 30.
(*b*) 3 *Campb.* 247.
(*c*) *In Gammon* v. *Schmoll*, 5 *Taunt.* 353.

must

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must be shown to be performed. The reasoning of Mr. Justice *Chambre* does not seem to have been sufficiently adverted to; and nobody will deny his ability as a lawyer, and his great skill as a pleader. That learned judge says (*a*), "I think the case is clear upon rules of plain common sense and understanding, without going into all the cases. A man is not bound to receive a limited and qualified acceptance, he may refuse it, and resort to the drawer; but, if he do receive it, he must conform to the terms of it."—"What is the meaning of these words, *accepted, payable at?* They have a meaning: they impose a condition; and the person receiving such an acceptance must comply with the condition, and in pleading, must shew his compliance. It would greatly circumscribe the negociation of bills of exchange if this were not so; for they would, instead of being of general accommodation, be restrained in their use to such persons in trade as have a fixed place of business." I have already endeavoured to show your Lordships that the inconvenience to holders of bills and to bankers would become ruinous by the number of clerks which they must employ, if such an acceptance is to be held to make the acceptor universally liable. 1st Question.

On these authorities, and upon the principles of common sense and understanding I am of opinion, on the first question, that the holder was bound to present this bill at Sir *John Perring*'s house for payment, and to aver that it was so presented.

2d Question.

As to the second question proposed by your Lordships to the judges, *viz.* whether such an acceptance is to be considered in law as a qualified acceptance, I answer, that the whole of my reasoning, with which I have troubled your Lordships, is founded upon the affirmative of that proposition. All the text writers upon bills of exchange are clear on this point. I take it, that any acceptance varying from the absolute tenor of that which the drawer expected by the language which he used in drawing the bill, either in the sum, the time, the place, or the mode of payment, is a conditional acceptance, which the holder is not bound to receive: but, if he do, the acceptor is liable for no more than he has undertaken. This doctrine of qualified

(*a*) In *Gammon* v. *Schmoll.*

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acceptance, as *to part* of the money, is spoken of in *Marius* (a), and in *Molloy.* (b) So, in the latter book, a partial acceptance as to time is mentioned. (c) This is confirmed in *Beawes' Lex Mercatoria* (d), and by Mr. Justice *Bayley.* (e) And it was treated as a qualified acceptance in *Sanderson* v. *Bowes*; and by Mr. Justice *Lawrence*, in *Parker* v. *Gordon*; and again in *Callaghan* v. *Aylett*, and *Gammon* v. *Schmoll* in the Common Pleas: I, therefore, feel no difficulty in stating to your Lordships, that I conceive this to be a conditional acceptance.

3d Question. The third question, in my view of the case, is not of difficult solution. *Marius* supposes (f), that if the holder take from the acceptor an acceptance, even for a *part* only of the money drawn for, he may do so, provided he protests and gives notice to the drawer, and the bill is not thereby void; nor, according to what he says in page 21., does it prevent the holder from having recourse against the drawer. This is stated in the case of so *material* a change, as a defalcation of part of the sum drawn for. But to the case put by your Lordships, I answer, that, if the qualification, either as to time or place, works neither injury nor inconvenience to the drawer, the holder is not prevented (in case of non-payment) from his remedy against the drawer, because he has taken such qualified acceptance. Your Lordships will perceive that I state, where it neither produces injury nor inconvenience. Now in the case, out of which this question arises, it neither produces the one nor the other: but it is a custom productive of great convenience to every one concerned in trade, and without which qualification, I have already stated to your Lordships, (and I know the fact to be so,) bills of exchange are not discountable.

4th Question. As to the fourth question, I am of opinion, that *C.* could not maintain his action for the original debt against *A.* the drawer, without delivering up to him the bill so accepted. Because, having once accepted such bill in lieu of, and in satisfaction of his debt, he cannot recover for the original debt without relinquishing the supposed security; which,

(a) *pp.* 17, 21.
(b) *b.* 2. *ch.* 10. *s.* 21.
(c) *id. s.* 28.
(d) *p.* 481. 4th ed. fol.
(e) *Bayley on Bills, pp.* 85, 86. 3d ed.
(f) *p.* 17.

5 being

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being an acceptance by *B.*, (whom the question supposes to be indebted to the drawer,) will amount, at all events, to an acknowledgment of the debt. For, although it is not always true that the drawee is a debtor of the drawer, yet, perhaps, when the drawee accepts, it is *primâ facie* evidence of a debt. The case of *Kearslake* v. *Morgan* (*a*), where it was held, that to an action for goods sold and delivered, it was a good plea to say that the Defendant had indorsed to the Plaintiff a promissory note, payable to him, the Defendant, "for and on account of" the said debt, is not inapplicable to this question to show, that *C.* could not maintain an action for his original debt while he held in his hands a bill given to him by the Defendant to that amount. I, therefore, answer to the fourth question proposed by your Lordships in the negative.

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Bayley J. 1st Question.

BAYLEY J. (after stating the case,) In answer to the first question proposed by your Lordships, I humbly submit, that the effect of such an acceptance is this, that to entitle the holder to sue the drawer or indorser, it casts an obligation upon him to present the bill at Sir *John Perring* and Co.'s for payment, and to aver in his declaration, that the same was so presented; but that, as against the acceptor himself, the holder is not bound so to present it; that he is under no obligation to aver any such presentment in his declaration; and, that the only consequence of his neglect to present, is this, that the acceptor may set up any loss he has sustained thereby as matter of defence. This question is raised upon a demurrer to the Plaintiff's declaration. The point, therefore, is not whether a neglect to present may not, even as against an acceptor, in some cases constitute a defence; but, whether the presentment is, or is not an essential part of the Plaintiff's title. A presentment is a demand at the place of payment, and to determine this point, it will be of assistance to call the attention of your Lordships to the rules which the law has laid down as to cases, in which a demand is, or is not necessary. And, one of these rules I take to be this, that where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement, without any previous

(*a*) 5 *T. R.* 513.

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previous demand; and that a tender or readiness to pay, must come by way of defence from the Defendant; but, that, if he engage to pay upon demand what was not his debt, what he is under no obligation to pay, what but for such engagement he would never be liable to pay to any one, a demand is essential, and part of the Plaintiff's title. If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration, nor proved upon the trial. And what is the reason? Because the note is considered as given for what is to be considered the party's own debt. In common actions of assumpsit, the promise is always stated to be to pay when thereto afterwards requested, yet a special request is never stated or proved; and the distinction in this respect is correctly taken in *Birks* v. *Trippet.* (a) That case was *assumpsit* on a promise to pay £40 upon request, if the defendant did not perform an award between him and the plaintiff; the defendant pleaded a bad plea, to which there was a demurrer: and then *Saunders* for the defendant objected, that the plaintiff had not laid any request of the penalty of £40. "For the declaration is, that the defendant promised to pay upon request, if he did not perform the award; and the request is material, for he took a difference between a mere duty and a collateral sum. For, where a mere duty is promised to be paid upon request, as if, in consideration of all monies lent to the defendant, he promised to pay them again upon request, no actual request is necessary, but the bringing of the action is a sufficient request; but otherwise it is upon a promise to pay a collateral sum upon request; for, there, an actual request ought to be made before the action brought. Now, here, the promise of payment of £40 upon request is collateral, and is a penalty, and not a precedent duty, and, therefore, there ought to have been a request before the action brought:" and of that opinion was the whole Court, and judgment was given for the Defendant. There are many other cases (b) to the same effect, but the principle is so well established, that it is unnecessary to cite them. Another rule upon the subject of demands I take to be this, that the fixing a special time and place for payment will not make an actual demand at that time and place necessary, as part of the plaintiff's

(a) 1 *Saund.* 33. *a.* (b) See 1 *Wms.'s Saund.* 33 *a.* *note* 2.

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title in a case, in which, otherwise, the demand would not be necessary; but that, in that case, also, a tender or readiness to pay at the time and place is matter of defence, and of defence only. An award directs money to be paid at a given time and place. In an action on such award, does the declaration allege any demand at that time or place? certainly not. Upon an application *inde* for an attachment, is not the attachment constantly granted, though personal demand was not made; at the time or place; and though attendance at the time or place is not stated? In *assumpsit* on the award, the declaration would be, that the Defendant promised to perform the award, and that the award directed payment at a given time and place: in substance, therefore, (incorporating the promise and the award together,) it is a promise to pay what is properly a debt of the Defendant's at a given time and place; and yet the declaration never states either attendance by the Plaintiff at the place, or a demand by the Plaintiff at the place: the utmost which it states is, that the Defendant did not pay at the time or place, or at any other time or place. To debt on bond, the Defendant, after oyer of the condition of the bond, which was the performance of an award, pleaded no award made. The Plaintiff replied an award made directing the Defendant to pay the Plaintiff £66 at his house at *Sennocke*, on the 22d *October*, between the hours of 10 and 12, but that the Defendant did not pay the £66 which he ought to have paid on that day, according to the form and effect of the award. (*a*) There are three precedents to this effect, in Mr. *Caldwell's* book upon awards (*b*), the first in assumpsit, the other two in debt: and there are many similar precedents in other books. The first stated, that an action had been brought to recover a balance of account, that the cause was referred, that each party undertook to the other to perform the award, and that the award was, that the Defendants should pay £ , being balance of account due from the Defendants, at the office of *L.* and *M.*, situated in, &c. between 10 and 12 *A. M.* on, &c. Whereof Defendants had notice; yet they did not pay the Plantiffs the said sum, or any part thereof, on, &c. at the said office of *L.* and *M.*, or elsewhere, or at any other time whatever; although Defendants afterwards, *viz.* on, &c. at, &c. were

(*a*) *Lutw.* 558. (*b*) *pp.* 318. 322, 323.

required

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required by Plaintiffs so to pay the same. The second stated, that differences had arisen, and were referred; that the arbitrator awarded; that, on a balance of all accounts between the parties, there was due and owing from Defendant to Plaintiff 61*l.* 10s., which he directed to be paid on 10th of *June*, between 11 and 1, at the house of one *G. H.*, Plaintiff's attorney, whereof Defendant had notice; yet Defendant did not pay the same, or any part thereof, at the time and place appointed for the payment thereof as aforesaid; nor hath he since paid the same, but hath wholly failed, and made default, whereby an action hath accrued, &c. — Now, upon what principle do these declarations omit to state attendance at the place, or demand at the place? Clearly upon this, that the money awarded to be paid became a debt from the Defendant; that he was under a general obligation to pay, and not confined to time or place; and that, therefore, attendance at time and place was not part of the Plaintiff's title; but readiness to pay at time and place was matter only of defence. Mr. *Caldwell*, indeed (*a*), lays it down, that where the money is to be paid at a certain time and place, the Plaintiff must aver that he attended there at the time appointed, and remained until the period within which payment was to be made; but this position is evidently founded on a mistaken notion of the case of *Phillips* v. *Knightly* (*b*): there, according to *Fitzgibbon*, the Plaintiff was, upon receiving the money, to give the Defendant a covenant of indemnity; there were, therefore, to be two concurrent acts, *viz.* the payment of the money, and giving of the covenant; and the Plaintiff could not sue for the money without showing a readiness, on his part, to give the covenant, which he had not done. This case, therefore, is not at variance with the established precedents, and I have only noticed it, that a mistake in a useful book may be corrected. Another class of cases, which I will mention, are cases of rents. Rent is reserved in some cases generally, and then the proper place for the payment, the place appointed by law, is the land out of which it issues. In some cases it is expressly made payable at some other place: and yet, in either case, is there a precedent, either in debt on the *reddendum*, or in covenant, of an averment, that

(*a*) *p.* 194.

(*b*) *Fitzg.* 53. 1 *Barnard.* 84.

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the Plaintiff was at the time and place to demand it. The declaration, in such cases, is always general, that on such a day so much of the said rent became due and in arrear, and that Defendant, although often requested, had not paid. So, in covenant upon a mortgage-deed to pay the mortgage-money, on a given day, in *Lincoln's Inn* Hall, or in any other place; or in debt upon a single bill to pay money for a past consideration, at a given place, the declaration never alleges attendance or demand by the Plaintiff; but, merely alleges non-payment by the Defendant. Now, what can be the principle of all these cases? What but this, that the money to be paid is a debt from the Defendant; that it is due generally and universally; that it will continue due, though there be a neglect on the part of the creditor to attend at the time and place to receive; that it is matter of defence on the part of the Defendant to shew that he was in attendance to pay, but that the Plaintiff was not in readiness to receive; and that defence will, generally speaking, be in bar of damages only, not in bar of the debt, and must be accompanied with a bringing of the debt into court. The instances in which this is made matter of defence will throw light upon the point. Most of those instances occur in demands for rent; but no distinction in principle can be drawn between cases of rent, and cases of other debts. I will mention some of these cases.—Lease for years, rendering 10*l.* (*a*) yearly at *Easter*, and for performing of covenants each bound in 20*l.* Non-payment of rent at *Easter*, and, therefore, the 20*l.* claimed. Plea, ready to pay at the day on the land, and no one attended to receive; and the plea was held good. In *Kidwelly* v. *Brand* (*b*), rent of land at *Lomer* was reserved, payable at *Hide*: and the question was, whether the landlord could re-enter for non-payment of rent without demand; it was adjudged, (though there are cases since to the contrary,) that he might: the reason given is, that the rent being made payable at a place off the land, it lost its character of rent, and became like a sum in gross, and then it was the tenant's duty to offer it, not the landlord's to demand; "Lessee ought to offer it for his own indemnity, as the obligor ought upon an obligation, or as the grantor of an annuity ought to offer the annuity at the day, to excuse himself of damages."

(*a*) 22 *H.* 6. 57. *Pl.* 7. (*b*) *Plowd.* 69. *Dyer*, 68. *a.*

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Buskin v. *Edwards* (a) corrects that case, by shewing that a payment due from a tenant still remained a rent, though made payable at the *Royal Exchange* in *London*. The propriety of what is said in *Plowden*, in case it had been a sum in gross, is not questioned. The inference, then, to be fairly drawn from the case in *Plowden*, corrected as it is by the case in *Croke Elizabeth*, is this, that if a sum in gross be made payable at a certain time and place, and the sum is properly a debt from the person who is to pay it, it is his duty to attend at the time and place and offer it, but it is not the duty of the person who is to receive it to demand it; and yet the offer is essential to protect him, not against payment of the sum itself (which, as being due, ought to be paid) but against damages.

In *Brook's* Abridgment (b) is this position: — "In debt for rent, tender on the land and refusal of plaintiff is no plea, for he shall answer to the *debet;* but the contrary in avowry; for, there is to be a return, and there ought not to have been distress if tender was made." Now what is the meaning of this passage? evidently this, that in debt it is no plea in bar of the action; it is a bar of damages only; not of the debt: and, therefore, he must answer to the *debet*, by bringing the money into the court upon the tender, which in the case of a plea in bar to an avowry he need not do. *Brownlow* v. *Hewley* (c) is an authority to shew that, upon a plea of tender on the land at the day, in an action of debt, the rent must be brought into court; and *Horne* v. *Lewin* (d) to shew, that, upon a plea in bar to an avowry, it need not be brought into court. In *Osborn* v. *Beversham* (e), in debt for rent the plea was readiness at time and place and ever since, and profert of the money. To this plea there was a demurrer, grounded on two objections. 1st, *Non obtulit*, for, when time and place are certain, *semper paratus* without an *obtulit* is no plea. 2d, It is pleaded in bar generally; it should have been in bar of damages only; and the Court thought both objections good. *Levinz* makes a query on the first ground, because the rent is demandable, (*i. e.* Plaintiff should have demanded it,) "otherwise," says he, "of a sum in

(a) *Cro. El.* 415. 535.
(b) *Dette, pl.* 216.
(c) 1 *Ld. Raym.* 82.
(d) *Id.* 639. *Salk.* 583.
(e) 1 *Vent.* 322. 3 *Keb.* 800. 2 *Lev.* 209.

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gross, which is payable without demand." In *Crouch* v. *Fastolfe* (*a*), cited yesterday by my Brother *Richardson*, to debt for rent there was a plea of attendance at the day and place, that the Defendant was ready to pay, and that no one came to receive. To this plea there was a demurrer, because tender was not alleged, but it was resolved to be well enough, and adjudged for the Defendant. A precedent of such a plea is in *Thompson*'s entries (*b*): however, in *Horne* v. *Lewin* (*c*) a *paratus* without an *obtulit* was held insufficient. It is immaterial to the point which I am considering, whether there ought to be a tender or not, and quite sufficient for my view of the subject if with a tender it would be a bar of damages. Now what are the legal conclusions which I draw, and the legal positions which I consider as resulting from the authorities with which I have troubled your Lordships? They are these, that, if a man, in respect of any debt which he owes, engage to pay it upon demand, or engage to pay at a given time and place, it is not a necessary part of the Plaintiff's title to make such demand or attend at such time and place; that he is not bound in his declaration to state any such demand or attendance; that a neglect to demand or attend will not bar his right to the debt and enable the Defendant to keep it; but, that the Defendant may shew readiness on his part to exonerate himself from any damages.

I now come to apply these principles to bills of exchange. The acceptor is, by the law and custom of merchants, considered as the principal debtor; the drawer and indorser as sureties only, liable on his default, and not otherwise. His engagement is general, that he will pay; that of the drawer and indorsers is conditional, namely, that if due diligence be used, they will pay, if the acceptor does not. The engagement of the acceptor is, either that he has effects in hand, or that he is secure of having them by the time the bill becomes due. In the language of the Lord Chief Justice *Eyre*, "The theory of a bill of exchange is, that the bill is an assignment to the payee of a debt due from the acceptor to the drawer, and the acceptance imports, that the acceptor is a debtor to the drawer, or at least has effects

(*a*) *S. T. Raym.* 418.
(*b*) *Lib. Placit.* 150.
(*c*) *Lord Raym.* 644.

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of the drawer's in his hands." The acceptor, therefore, has, or ought to have, in his hands or under his control, the fund by which payment ought to be made; and it is his duty so to apply it. The drawer or indorsers have no control over the fund, and consequently no duty with respect to it. This difference of situation and character between the drawer and indorsers and acceptors, has produced a settled distinction in the manner of suing them. The action against drawer and indorser invariably shews that due diligence has been used; the action against the acceptor invariably omits it. In an action against the drawer and indorsers, the declaration invariably avers presentment of the bill, its dishonour, and notice thereof to the defendant. In an action against the acceptor no such averments are made. Every bill is to be properly presented for payment; and, in an action thereon against the drawer or indorser, a presentment according to the usage and custom of merchants, must be averred and proved. In an action thereon against the acceptor, presentment (generally speaking) need not be averred or proved. This is clear, settled, undisputed law. Not that, in practice, such presentment is likely to be omitted: the risk of losing the responsibility of the drawer and indorsers generally secures it: but if there were to be an omission, that is no reason why the acceptor, who has, or ought to have, funds to discharge it, should keep those funds to himself, or should refuse so to apply them.

If a bill be addressed to *A*, in *Bedford-square*, and he accept it generally, in an action against the drawer or indorser, presentment must be alleged and proved: in an action against *A*, presentment need not be alleged or proved. If *A* have changed his residence, and accepted it, payable at his new abode, does this make any difference?—presentment need not be averred in the one case —need it be averred in the other? If the necessity exist, there must be some reason for it. What is that reason? Though I am putting the case where the bill is still payable at the party's own house, and this is the case where the bill is made payable at a banker's, does this make any difference, does it vary the character or situation of the acceptor, so as to put him in the situation of a surety only instead of a principal, and if due diligence be not used,

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exonerate him from all liability, and enable him to keep the money to himself? The form of the acceptance in this case is material. The declaration states it thus: "Which bill of exchange he the said *Joshua* accepted, according to the said usage and custom of merchants, payable at Sir *John Perring* and Co.'s, bankers, *London*; that is to say, at the house of certain persons using in trade and commerce the names, style, and firm of Sir *John Perring* and Co., bankers, *London*." By whom the bill is to be paid at Sir *John Perring* and Co.'s, whether by the Defendant or by Sir *John Perring* and Co., the acceptance does not state; whether Sir *John Perring* and Co. were bankers for the defendant is not stated. In the first place, it is not in a form to require Sir *John Perring* and Co. to pledge their credit for the payment of the bill; it is, at most, only an authority to them to pay, and, unless Sir *John Perring* and Co. choose to make themselves responsible, they can never be sued for the money. Why it is to be paid there; whether because Sir *John Perring* and Co. were the Defendant's bankers, or because he was an inmate or member of that house, is not stated. I will take it, however, for granted, for the sake of argument, that it is made payable there, because Sir *John Perring* and Co. were the Defendant's bankers. Sir *John Perring* and Co., then, are to be agents for the Defendants in this transaction. Will making the bill payable at an agent's change the situation of the acceptor, and make it incumbent on the holder, in an action against the acceptor, to aver and prove presentment at such agent's, when they would not be bound to aver or prove presentment at the acceptor's? That such presentment will generally be made, there can be no doubt, because, otherwise, the security of the drawer and indorsers will be lost, but though presentment is in fact made, there may be cases in which the party may fail in proving it. The party presenting the bill may remove out of the reach of the holder, or may die. Is it right or is it law that, because the holder fails in that link of evidence, he is to lose his debt? Before the necessity of such averment is established, I wish to draw your Lordships' attention to the consequence. If the effect of such an acceptance be to make this averment and proof essential, it follows, that the holder has a right to object to this burthen, and reject the acceptance. Right to reject is admitted

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in *Bishop* v. *Chitty*, *Callaghan* v. *Aylett*, and in *Gammon* v. *Schmoll* (a). Will this produce no confusion in the course of trade, when this mode of acceptance prevails to such an extent as it does? The bill is generally left for acceptance at the house of the drawee by a clerk, and called for on the next morning. Suppose a party leaves a bill drawn on the drawee generally, at the house of the drawee, and that on calling for it he finds it accepted, payable at a banker's; if this mode of acceptance cast an additional burthen on him, he may take away the bill, strike out the acceptance, treat it as dishonoured, protest it, if it be a foreign bill, and, at once, commence actions upon it against all the parties. It may be said that this has never yet been done, and that the apprehension is chimerical. But why has it not been done? Because it has been, for a series of years, the rooted understanding in commerce, that an acceptance at a banker's throws no additional burthen upon the holder; but that it is merely an intimation, that there the acceptor would be ready to pay it: once establish, that such an acceptance is conditional, and that the burthen of proving presentment at the banker's is thrown on the holder; and, from that moment, every such acceptance must be rejected. What will the drawer and indorser say? They will say, "If you take such an acceptance, you do it at your peril; and we are discharged." The acceptor has no right, by the acceptance which he takes, to cast a burthen upon them. They are entitled to expect, that, if any acceptance is taken, it shall be such an acceptance as does not make such additional averment and proof essential. Taking such an acceptance, then, if it has the effect contended for, would discharge them unless they had immediate notice of such acceptance, and assented thereto. It may be said, that notice then may be given to them; but will your Lordships come to a decision which imposes on the holder the necessity of giving notice to all the parties to the bill? If I were to state that there are daily in *London* one hundred such acceptances given, I should speak far within the truth. If these acceptances be conditional, notice ought to be daily sent by the post to the drawer and indorsers of each bill, not that the bill is dishonoured, but that it is accepted payable at a

(a) *Per Chambre & Dallas Js.*

banker's.

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banker's. The fact that no such notice is given, notwithstanding the prevalence of such acceptances and the perfect acquiescence therein, shews stronger even than positive authorities what has been the understanding, usage, and custom of the mercantile world concerning them: and, bills of exchange being mercantile instruments in daily occurrence, if they have received a mercantile construction, the construction put on them by the mercantile world ought to be their construction in a court of law.

I have troubled your Lordships so much at length on the principles, which, in my view, govern this case, that I shall address the house but shortly on the decisions. The point came first before the Court (as far as we can learn from printed reports) in *Smith* v. *De la Fontaine:* that case was tried before Lord *Mansfield*, in 1785, and from that time to the year 1806, the question does not appear to have been agitated. Then came *Callaghan* v. *Aylett*, in 1811, in which the decision was adverse to that of *Smith* v. *De la Fontaine*. The case of *Callaghan* v. *Aylett* was in the same year followed by that of *Fenton* v. *Goundry;* and I will only excuse the Court of King's Bench for coming to a decision on that case, (adverse as it was to the decision in *Callaghan* v. *Aylett*) at the moment, because Lord *Ellenborough* (and that learned person, while at the bar, had most extensive experience in cases of bills of exchange) laid the foundation of his judgment in *Fenton* v. *Goundry*, on the invariable usage, to which he adverted in energetic language: on that ground only the Court of King's Bench did not take time to consider in that case.

The case of *Fenton* v. *Goundry* was followed by that of *Gammon* v. *Schmoll*, which I will only notice on account of the case of inconvenience there put by *Chambre* J., and to the case put by him I will add one or two other supposed cases. A bill is brought to me for acceptance just as I am setting off for the circuit; I tell the holder that I am going to be absent from town, and that I can only accept the bill payable at my bankers: he refuses this acceptance, on the ground, that it will give him additional trouble and inconvenience; and the bill is, consequently, dishonoured. Suppose the case of a bill drawn in the *West Indies*, on a merchant in *England*, who accepts it payable at a banker's: the merchant, finding the bill not debited to him, supposes there may have been some neglect on the part of the holder,

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but finds the bill protested for non-acceptance, that the person who presented it for acceptance was a notary, that the acceptance has been struck out, and the bill returned to the drawer in the *West Indies*; and that the holder has recovered 20 *per cent.*, or whatever difference may have been occasioned by the existing rate of exchange beyond the nominal amount of the bill.

Many of the principles now insisted on, may seem at variance, I admit, with the decision in *Sanderson* v. *Bowes*, and the other cases on promissory notes. I could distinguish those cases from *Fenton* v. *Goundry*; for, in the latter case, the acceptance payable at the place was no part of the original conformation of the bill itself; but, in the former cases, the words, restrictive of the payment, were incorporated in the original form of the instrument. But I do not wish to answer those cases, on these grounds; for I am free to confess, that I doubt the propriety of those decisions, although I was myself a party to them; and, I think it more manly to say, that I consider my opinions, in those cases, erroneously formed, than to attempt to distinguish those cases from *Fenton* v. *Goundry*, by the use of nice and subtle differences. I hope, therefore, that the case of *Sanderson* v. *Bowes* will not be followed as a precedent; for, as far as I can judge, the principles for which I have been contending apply to promissory notes as well as bills of exchange. The case of *Bishop* v. *Chitty* (*a*), proceeded partly, and, I think, principally on the ground, that there was actual *laches* on the part of the holder, and *laches* which prejudiced the acceptor. In that case, the acceptance was, "Messrs. *Caswell* and *Mount* pay this bill, when due, for *Thomas Chitty*;" it was, therefore, in a form entitling the holder to call upon *Caswell* and *Mount* to pledge their responsibility for the payment of the bill. In the case before the Court, the holder has no right to call upon Sir *John Perring* and Co. to pledge their responsibility for payment; nor can they be sued if they refuse to pay it: there is no privity between them and the holder: this principle is established in the case of *Williams* v. *Everett* (*b*). In *Bishop* v. *Chitty* the bill fell due on the 2d of *January*, and *Caswell* and *Mount* paid till the 19th of that month, and the bill was not presented till the 21st: *Lee* C.J. held, that it was the loss of the Plaintiff; for this acceptance was in the nature of a draft, which is always considered as actual pay-

(*a*) *Str.* 1195. (*b*) 14 *East*, 582.

ment,

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ment, when a reasonable time to receive it is elapsed. The form, therefore, of the acceptance in that case, which was in the nature of a draft on *Caswell* and *Mount*, and the neglect of the holder to call to receive it, distinguish it from the case before the Court. In *Sebag* v. *Abitbol*(a), a bill was accepted payable three months after date, at a banker's in *London:* the bill, by reason of its being mislaid, was not presented for payment, but the acceptor was, some months afterwards, informed of its being mislaid, and it was held he was not discharged; and the drawer was allowed to set it off in an action brought against him by the acceptor, although the banker, at whose house the bill was payable, had failed about four months after such information was given, and though the acceptor had at all times, up to the failure of the bankers, a balance in their hands sufficient to cover the acceptance. For these reasons, considering, that the money payable by a bill, becomes by the acceptance the debt of the acceptor; that he is looked upon as the immediate debtor; that, by making his acceptance payable at his banker's, without putting it in a form to pledge his banker's liability, he only specifies a place where he, by himself, or his agent, will be ready to pay; considering, that he may have no funds in his banker's hands, or has full power to withdraw them; that much trouble, and inconvenience, and confusion, may result from holding that this is a conditional and restrictive acceptance; and, that every inconvenience will be sufficiently obviated by holding, that neglect by the holder will be matter of defence to the extent to which such neglect causes loss, I submit, in answer to the first question proposed by your Lordships, that, as against the acceptor, the holder of this bill was not bound to present it at Sir *John Perring*'s for payment, or to aver such presentment in his declaration.

2d Question.

On the second question proposed for the consideration of the Judges, I shall content myself with saying, that, for the reasons which I have already stated, I am of opinion, that, as against the acceptor, such acceptance is a general acceptance, with an engagement or direction that payment may be obtained at the banking-house, with this addition only, that, if the acceptor should be able to prove, that, by any neglect in the holder in not duly presenting, he had sustained any loss, he should be relieved to the extent of such loss.

(a) 4 *M.* & *S.* 464.

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3d Question.

In answer to the third question, I submit, that a distinction is to be taken between an acceptance qualified as to time, and an acceptance qualified as to place. If *C.* take from *B* an acceptance qualified as to time, giving *B* a longer time for payment of the bill than the bill itself specifies, I consider it as quite clear that *C* could not sue *A* upon the bill. The holder of a bill has no right to give the drawer time. If he do, he does it at his peril. *English* v. *Darley* (*a*) establishes, that indulgence to the acceptor *after the bill is dishonoured*, discharges the drawer and indorsers, and there are many other cases to the same effect: if so, indulgence to him before the bill is due must have the same effect. An acceptance qualified as to place, will, or will not, take away from *C* the right to maintain an action against *A* upon the bill, according as such acceptance does, or does not, throw upon *A* an additional burthen, or cast upon him any prejudice. If the bill be payable at a place where the drawer lives, his house is *primâ facie* the place at which it is to be paid, but the usage of merchants warrants the drawer in naming any other house *at the same place* for payment. If the drawee has no house at the place where the bill is made payable, the holder has a right to require from him an acceptance specifying some house in particular in that place, for its presentment. This doctrine is laid down by *Holt* C. J. in the case cited by my Brother *Holroyd* (*b*). But, if naming a particular house casts upon the drawer any new burthen or prejudice, the holder, by allowing such house to be named, has done, as to him, what he was not warranted in doing, and the drawer is discharged. The question, then, is, Does the qualification as to place cast on the holder a new burthen or prejudice? and, if it oblige him to prove at his peril, in an action against the acceptor, what upon a general acceptance he would not be bound to prove, it does cast upon him a new burthen.

4th Question.

In answer to the fourth question, I am of opinion, that *C* would not be at liberty to maintain an action against *A* on his original debt, without delivering to *A* the bill so accepted; because *A* has by the bill offered to *C* a credit upon *B*, and *C* has consented to that credit: and *C* has no right to double payment from *A* and *B*. *Kearslake* v.

(*a*) 2 *B. & P.* 61. (*b*) *Ld. Raym.* 575.

Morgan

Morgan (a) is an authority in point, to shew, that, if a debtor pay his creditor, by a note or bill, which the creditor takes on account of his debt; such taking of a bill will be an answer to an action brought by the creditor against his debtor for that debt, unless the creditor gives up such bill.

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WOOD B. In answer to the first question proposed by your Lordships, I am of opinion, that, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage and custom of merchants, "payable at Sir *John Perring* and Co., bankers, *London*," that is to say, at the house of certain persons using in trade and commerce the name, style, and firm of Sir *John Perring* and Co., bankers, *London*, the holder was bound to present it at that house for payment, and to aver in his declaration that the same was presented at that house for payment.

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It is clear, that the drawee of a bill of exchange, if he choose to accept it, may do it generally, or may make a special or qualified acceptance. The holder may refuse to take a special or qualified acceptance; but, if he do take it, he is bound by it, as that constitutes the contract between him and the acceptor. There are many cases which might be cited to prove this position, but I will only trouble your Lordships with one. In *Petit* v. *Benson* (b), a bill was drawn upon the Defendant, who accepted it by indorsement, in this manner, "I do accept this bill, to be paid half in money and half in bills;" and the question was, whether there could be a qualification of an acceptance, for it was alleged that his writing upon the bill was sufficient to charge him with the whole sum: so that the question here must have been, whether the words "to be paid half in money and half in bills" would not be rejected, and the acceptance stand as a general acceptance? "But 'twas proved by divers merchants, that the custom among them was quite otherwise; and that *there might be* a qualification of an acceptance; for he that may refuse the bill totally, may accept it in part. But he, to whom the bill is due, may refuse such acceptance, and protest it, so as to charge the first drawer; and, though there be an acceptance, yet, after

(a) 5 *T. R.* 513. (b) *Comb.* 452.

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that, he hath the same liberty of charging the first drawer as he before had:" that is, although there be an acceptance written, if he refuses to take it, he may strike it out and charge the first drawer. It is observable that the case says, the custom was proved by several merchants: at that time, it was usual to set out the custom of merchants in the declaration, and to prove it by witnesses, which accounts for the words "'twas proved by divers merchants;" but it was afterwards, in the same reign (*a*), held, that the court was bound to take judicial notice of the law merchant; and, therefore, it is not usual now to set out the custom, but to allege that, according to the custom of merchants, such an one drew a bill, and such an one, according to the custom of merchants, accepted, &c.

As there may be a qualified acceptance, is the acceptance in question a qualified acceptance? What makes a qualified acceptance? Why, the words used by the party in his acceptance. Do the words "payable at Sir *John Perring* and Co.'s bankers, *London*," mean nothing? Are they mere surplusage? If so, then this bill ought to have been presented for payment at *Torpoint*. To make such constructions would, I conceive, be contrary to the usage of merchants, and the plain sense and meaning of words. Acceptance imports a promise; and the acceptance in question is a promise to pay at a particular place, that is to say, at a banker's in *London*. An acceptance is an *actual promise* to pay, (*per Curiam*, in *Mitford* v. *Walcot* (*b*)). There are two conflicting decisions of the Courts of King's Bench and Common Bench upon the point in question, *viz.* the case of *Fenton* v. *Goundry*, in K. B., and the case of *Gammon* v. *Schmoll*, determined by the Court of C. B. On those cases I will not trouble your Lordships with my comments: but I must observe, that there is a very material case of *Sanderson* v. *Bowes*, which, though my brother *Bayley* does not seem *now* to think so, I hold to be good law. In that case, a promissory note was made payable at a banking-house, and the Court held presentment at the banking-house a condition precedent to the maintenance of the action. I cannot distinguish the case in question, in principle, from this of *Sanderson* v. *Bowes*, where the Defendant *promised*

(*a*) *W.* 3. (*b*) 12 *Mod.* 410.

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to pay at the banking-house at *Workington*, to one *R. Nelson* or bearer. The Court of King's Bench on demurrer held, *that it was necessary to present* the note for payment at the banking-house at *Workington*, which seems to me to be contrary to the former decision of that court in the case of *Fenton* v. *Goundry*, which was the case of a bill of exchange accepted payable at a particular bankers (like the acceptance in this case). The distinction which the Court of K. B. took, was, that the acceptance was no part of the original conformation of the bill itself, but that the words in the note (in *Sanderson* v. *Bowes*) restrictive of payment at the place named, were incorporated *in the original form of the instrument* which alone created the contract and duty of the party. Try this case by that principle; what alone creates the contract and duty of the acceptor? — Why his acceptance. There is no antecedent debt due from the acceptor to the holder. What is incorporated in the original form of the acceptance? The place of payment. It is true, that acceptance is a subsequent act to the first conformation of the bill: it is a subsequent contract between the acceptor and holder; but, it is the only contract which there is *between* them. It is, in point of law, a promise of the acceptor to pay the bill at a specific place. The declaration states, and incorporates in the acceptance as there stated, the very words "payable at Sir *John Perring* and Co.'s, bankers," and the promise alleged is to pay according to his said acceptance. The Plaintiff by his declaration does not reject these words as surplusage, but considers them as forming part of the acceptance. Suppose, instead of a note, a bill had been drawn on *Bowes* and Co., and they had accepted it payable at their banking house at *Workington*, and subscribed the acceptance, can it be contended, that, in one case, the holder is bound to present at the place, and, in the other, not? I say, therefore, as was said in *Sanderson* v. *Bowes*, that a demand by the holder of payment of the bill at the specific place was a condition precedent, in order to give himself a title to receive the money.

As to the second branch of the first question, *viz.* Whether the Plaintiff is bound to aver in the declaration, that the bill was presented at the house of *Perring* and Co. for payment? I take it to be a condition precedent that it should be presented for payment at the appointed place; and, if so, with-

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out doubt, the Plaintiff cannot maintain his action without averring performance of that condition precedent, and so the Court of King's Bench held in *Sanderson* v. *Bowes*. It is not necessary, as between the holder and acceptor, that the holder should aver presentment on the day when the bill becomes due; because the acceptor is liable at all times afterwards, whenever it shall be presented at the appointed place. His liability is not confined to any day; his liability is to pay any time after the bill becomes due, if presented at the appointed place. The presentment on a particular day can only be material to charge the drawer. It has been argued, that presentment need not be averred, but, that it is matter of defence. I think, that it may be matter of defence although not averred; and, that, at the trial, the Plaintiff ought to be called on to prove it; otherwise, after verdict, it might be presumed, that it had been proved to be presented according to the acceptance. If a bill directs the payment at a certain place, it ought to be paid there without other demand than at the place, though the acceptor lives at a place remote (*a*). The place where a bill is to be paid is so important, that, if it be directed to a person generally, and he will not accept it to be paid at a certain place, the holder may protest it. If a bill be accepted at *Amsterdam*, and no house named where the payment is to be, the party need not to acquiesce in it, but may protest the bill; but, if he will acquiesce, it is well enough (*b*). Then, according to the doctrine contended for, although the law requires a place of payment to be named; yet, when it is named, you are not obliged to resort to it for payment. The mischief to the commercial world, and to all who have any concern with bills, would be very great, if the holder were not bound to present for payment at the appointed place; but, on the contrary, might, at once, without any presentment, bring an action against the acceptor. The acceptor would have no means of avoiding an action (and, perhaps, an arrest); for his acceptance may have been in circulation, and may be in the hands of persons of whom he knows nothing: so that he cannot tell to whom to send or tender his money, or how he is to get discharged; and the first notice which he has of

(*a*) *Com. Dig. tit. Merchant*, 200.
(*b*) 12 *Mod.* 410. *Mitford* v. *Walcot.*

who

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who the holder is, may be by an action. Common sense and common justice, and the convenience of mankind, all concur in telling one, that a man, who has agreed to take an acceptance payable at a specified place, should be bound to have recourse to that place for payment before he can sue the acceptor. It has been argued, that the Defendant should not have demurred, but should have pleaded, that he was ready to pay at the appointed place, but nobody came to receive payment. That, I conceive, was not necessary; because the first act to be done (which is a condition precedent) is the presentment of the bill for payment at the appointed place; and the Plaintiff must shew that to maintain his action; and so was the determination in *Sanderson* v. *Bowes*. But, considering the presentment and payment to be concurrent acts, the party who brings the action (not he who defends it) must shew, that he has done what is necessary on his part to maintain that action, namely, that he has been ready with his bill to present, and, thereon, to receive payment at the appointed place. In answer to the arguments raised from forms of pleading, I say, that the Defendant may avail himself of this objection in different shapes; 1st, as in this case, by demurrer; 2dly, he may plead the general issue, and, for want of proof of presentment, apply for a nonsuit; or, 3dly, he may plead specially, that he was ready at the appointed place to pay, and that no presentment was made, or, generally, that the bill was never presented at the appointed place. It has been argued, that presentment for payment need not be averred, and that it never is averred in a declaration against the acceptor; and I agree, that, where the acceptance is general, it is so; and the reason is this, because the acceptor is always liable: his acceptance operates as a promise to pay, not only at the time when the bill is due, but at all times afterwards when requested, or on demand; and the bringing the action is in law a request or demand. But, where place is of the essence of the contract, as in the case in question, though it be not necessary, to aver presentment at the day, it is necessary to aver presentment at the place on some day before bringing the action. One who is indebted promiseth to pay it upon request: in an action upon the case upon that promise, the party needs not to express the assumpsit with

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with the request, it *being an old debt;* but otherwise it is, where there is such a promise *without any duty precedent* (a). In debt or detinue, the very bringing of the action and demand of the writ is a demand and request (b). Acceptance after the time of payment elapsed, and a promise then to pay according to the tenor of the bill, is good, and amounts to a promise to pay the money generally (c). Arguments have been drawn from forms of pleading in actions on bonds or obligations and other actions in debt, and it is contended that it lies on the Defendant to plead either a tender or that he was ready to pay and bring the money into court. These rules are not applicable to this case: this is not an action of debt or *indebitatus assumpsit* on an antecedent debt. It is well established, that an action of debt will not lie on the acceptance of a bill of exchange, it is an action on the custom of merchants for damages only without any antecedent debt. As to debt on bonds or obligations, they create an immediate debt, and the Defendant must shew that he has done all that was necessary on his part to perform the condition, and that it was the fault of the obligee that it was not completed. But, when the Plaintiff brings an action for a demand dependent on a condition precedent on his part to be performed, there, he must aver performance to maintain the action, as in *Sanderson* v. *Bowes*.

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2d Question. In answer to the second question proposed by your Lordships, I am of opinion, that this bill having been so accepted as aforesaid, such acceptance is, in law, to be considered as a qualified acceptance to pay the same at the said house of Sir *John Perring* and Co., bankers, *only;* and, that it is *not* a general acceptance to pay the same with an additional engagement or direction for the payment thereof at that house, for the following reasons. It is the custom of merchants and opulent persons to keep their monies at bankers, and to accept bills to be paid at their bankers, that they may not be under the necessity of keeping money at their own houses, or entrusting money to their servants in their absence to take up acceptances, or of carrying money about their persons to answer such acceptances, if demands

(a) 4 *Leon.* 2. *Pulmant's* case.
(b) *Per Jones* J. *Godb.* 403. *Hern & Stub's* case.
(c) 1 *Salk.* 129. *Mitford* v. *Wallicot.*

should

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should be made upon them personally. Such special acceptances are conveniences to both holder and acceptor. But this object, so far as respects the acceptor, would be totally frustrated, if, at the election of the holder, he, the holder, could reject the appointment of the place of payment in the acceptance as mere surplusage, and demand payment wherever he pleased. What authority is there either in law or common sense to say, that a promise (and an acceptance is a promise) to pay at a particular appointed place by name, is to be expanded (for that I think is the phrase) into a promise to pay in every corner of the kingdom where the acceptor may happen to be, as well as at the particular appointed place. The acceptor is under no previous obligation to pay; he owes no debt to the holder prior to his acceptance; his acceptance is the only thing which constitutes the compact between him and the holder. The expression of one particular place, according to a well known maxim, is the exclusion of any other. There is no law or custom of merchants to justify such an *expansion*, or rather I should say, *expulsion* of men's words and meanings. I remember cases of this sort. A person has given a promissory note payable at a particular time, and has *signed* it; and, after he has signed it so that he has *completed* the instrument, he has put upon the side or bottom of the note a memorandum of a particular place where it will be paid. In such a case, the particular place is no part of the note, and does not controul its general operation: it is no variance in a declaration to omit such a memorandum: it may, perhaps, amount to evidence of an additional engagement that it shall be paid at that place. But, here, the acceptance is only one single continued sentence, at the end of which, probably, stands the signature of the acceptor. *Wood* B. 2d Question.

3d Question. In answer to the third question proposed by your Lordships, I am of opinion, that, if *A.* draw a bill on *B.* in favour of *C.* for 100*l.*, and *C.*, without the previous authority or subsequent assent of *A.*, take an acceptance of the bill for the whole of the 100*l.*, but an acceptance qualified as to the time or place of payment, *C.* could, notwithstanding such acceptance, maintain an action upon the bill against *A.*, unless the qualification as to time or place produces a damage or injury to *A.*, for the following reasons. If the holder, without such previous authority or subsequent assent of *A.*

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the drawer, enlarge the time of payment by the acceptor; that may injure the drawer and operate to discharge him: or, if he take an acceptance payable at a distant place, so that, if the bill be dishonoured, notice cannot be given to the drawer so soon as it might if the acceptance had been general, that may injure the drawer and discharge him as for want of due notice. But, in the case of a bill drawn on a person in *London*, and accepted payable at a banker's in *London*, I should think such special acceptance would not operate to discharge the drawer, if due notice was given to the drawer of the nonpayment, because, in such a case, the special acceptance does the drawer no injury.

4th Question.

In answer to the fourth question proposed by your Lordships, I am of opinion, that, if *A.* were debtor to *C.* in 100*l.* previous to his so drawing upon *B.* in favour of *C.* to the amount of 100*l.*, *C.* could not, upon *A.*'s refusing his assent to an acceptance qualified as mentioned in the above question, maintain an action upon the original debt against *A.*, without delivering to *A.* the bill so accepted; in case, at the time the bill was drawn, *B.* was also indebted to *A.* in a like sum of 100*l.* Least I should have mistaken this question, I will take the liberty of offering some reasons or explanations. If *C.* take the draft of *A.* upon *B.*, for a debt due from *A.* to *C.*, *C.* is bound to use his endeavour to get it accepted and paid, and, if it be not honoured, is bound to return it to *A.* in due time, and to deliver it up to *A.*, and, that being done, it is the same, then, as if no bill or draft had been given; and *C.* may then maintain his action against *A.* for his original debt. If the bill have been left for acceptance, and *B.* have written a qualified acceptance upon it, which *C.* does not chuse to take, he should inform *B.* that he will not take an acceptance so qualified, and require a general acceptance; and, if that be refused, he should strike out what was written, and return the bill to *A.* as an unaccepted bill, in which case, *C.* may resort to his original debt against *A.* If *C.*, without *A.*'s previous authority or subsequent assent, accepts and assents to *B.*'s acceptance, so qualified as to time or place as materially to alter the condition of the drawer, in that case, he can only resort to *B.*, the acceptor, according to the terms of his acceptance, and *A.* will be discharged from his debt to *C.*, for which he gave the bill; and *B.* will be discharged,

charged, as against *A.*, from his original debt, for which he gave his acceptance, and can only be sued on his special acceptance.

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GRAHAM B. The general question proposed by your lordships is, whether the words of this acceptance form a condition precedent, and whether such expressions constitute a qualified acceptance, or a general acceptance with an additional engagement or direction for payment at the house mentioned. If these words do constitute a condition precedent, it was necessary before action brought to demand payment at the place mentioned, and to aver in the declaration that the plaintiff had so done. When a man accepts a bill, it is the most solemn, because it is the most public recognition of the drawer's right to demand the amount of it from him. The acceptance is an obligation to pay all over the world, and the question is, whether generally speaking, in the intention of the acceptor and the understanding of the holder, the words "payable at Sir *J. Perring* and Co's," contract this general obligation to an engagement that the acceptor will pay the drawer there and no where else, (as some seem to think,) or, at least, not till it be proved that a demand was made there in vain. In my apprehension, such an acceptance is no qualification of the general liability of the acceptor. It is a substitution of the banker's for the person and abode of the acceptor, for mutual convenience; and means only to charge the drawer and indorsers *in transitu*, that the holder, instead of calling upon the acceptor, should make his demand at the banker's. No demand is necessary against the acceptor, he is liable without demand; but, to charge the drawer, you must prove a demand on the acceptor, or on the persons whom he has identified with himself for that purpose. The question, then, will be, does a man mean to impose a condition, or to suggest, for mutual convenience, a place, where, with least trouble to both, the money may be had? But this question, of daily occurrence, simple as it may seem and of easy solution to some, is rendered complicated and difficult by great and conflicting authorities.

As to the balance of authority, I think it cannot be doubted, from the case of *Smith* v. *De la Fontaine*, in

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1785, what Lord *Mansfield's* opinion was. His great experience and knowledge of mercantile transactions and high character, carry with them strong evidence of the prevailing opinion. *Saunderson* and others v. *Judge* (*a*), in 1795, was an action on a promissory note (and, for the present, I make no distinction between notes and bills) against the indorser. *Sharp* the maker promised to pay to *Wilkinson* or order; and, at the foot of the note, there was a memorandum, that he would pay it at the house of *Saunderson* and Co., with whom he had a cash account. *Wilkinson* indorsed to *Judge*, he to *Sanders* and Co., and they to *Saunderson* and Co. *Sharp*, before the note became due, absconded, and *Saunderson* wrote by the post to *Judge*, giving him notice of the non-payment. The declaration was in the general form, without stating the memorandum or any thing tantamount to an application to the Plaintiffs. At the trial, the Plaintiffs were nonsuited, as they had not proved an actual demand on the maker; and the language of the court, consisting of *Eyre* C. J., *Heath*, *Buller*, and *Rooke*, Judges, after the argument upon the motion for a new trial, forms the foundation of my opinion. They said, "It was no part of the contract that the note should be paid at the house of *Saunderson* and Co., and, therefore, that was not necessary to be stated in the declaration: the maker merely appointed the house of his banker as the place where he was to be called upon for payment. It is not necessary that a demand should be personal; it is sufficient if it is made at the house of the maker, and it is the same thing in effect, if it be made at the place where he appoints; and as the demand was to be made at the house of the Plaintiffs themselves, it was sufficient for them to turn to their books." But, it may be said, this was the case of a detached memorandum. I will say a few words on the subject of the supposed difference between such a memorandum at the bottom of a note, and an acceptance of a bill of exchange payable at a particular place. The case of *Lyon* v. *Sundius* (*b*), was an action by the indorsee of a bill of exchange against the acceptor; the declaration stated only a general acceptance. It was precisely this case, the acceptance being "payable at Messrs. *Hankey* and Co's." The very same objection was

(*a*) 2 *H. B.* 509. (*b*) 1 *Campb.* 423.

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taken by Mr. *Park*, and I am free to say, that the words of Lord *Ellenborough* carry conviction to my mind, and form the foundation of my opinion. "How can you make the words *payable at Hankey and Co's* more than a mere memorandum? The acceptor of a bill of exchange is liable universally. This very point was brought before the court some time ago," (alluding probably to *Saunderson* v. *Judge*, of which Mr. *Park* said he had some impression on his mind), "when," says Lord *Ellenborough*, "the judges were all of opinion that such words formed no part of the contract, and did not require to be set out in the declaration." It is difficult to believe, I had almost said impossible, that the case should have rested there, if that had not been the opinion of all the judges of the King's Bench; and, as proof, in the very next year (1809), at the *Hilary* term sittings, Mr. Justice *Bayley* held, in the case of a promissory note (*a*), that, in an action against the maker, there was no necessity to prove that it was presented where payable. These authorities are followed by the decision in *Fenton* v. *Goundry*, on the fullest consideration of *Callaghan* v. *Aylett*, then lately determined in the Common Pleas. I cannot help adding the two decisions at *Nisi Prius* of Lord Chief Justice *Gibbs* (*b*); these, together with the common form of declarations, make a weight of authority, which it is difficult to counterpoise.

But, it is said, in order to diminish the weight of these authorities, that the Court of King's Bench have not always been consistent. And first, it is said, that, in *Parker* v. *Gordon* (*c*), they have recognized the propriety of an application at the place of payment. But that was an action against the *drawer;* and it is universally true, that to charge the drawer, you must prove a demand on, and refusal by, the acceptor or his substitute. If, therefore, he says, "I accept payable at my banker's," he says, "it is there I am to be called upon for payment; that is my house, there it is where I am to be found, and I authorise you to consider me as personally present there for the purpose of payment:" and, if so, the holder may be presumed to know the banking hours.

(*a*) *Wild* v. *Rennards*, 1 *Campb.* 425. n.
(*b*) *Head* v. *Sewell*, *Richards* v. *Milsington*, *Holt*, *N.P.C.* 363, 364.
(*c*) 7 *East*, 386.

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And, if the holder were not bound to this, he should have gone, as Lord *Ellenborough* says (a), "a step further," and proved a demand on the acceptor; for, otherwise, no demand is made on the acceptor. Secondly, it is said, that they have impaired, if not contradicted, the case of *Fenton* v. *Goundry*, by that of *Sanderson* v. *Bowes*: this argument or assertion is founded on the supposed perfect analogy between bills of exchange and promissory notes. I perfectly agree, that, in some cases, place may be essential, and may be rendered so by the terms and occasion of the acceptance. A case may be put, of a man, who, remitting all his property to *England*, and taking his departure from *India*, accepts a bill for 5000*l*. at six months, payable in *London*: he loses his passage: it could never be said, in such a case, that the acceptor engaged to pay in *India*, or at the *Cape of Good Hope*, on his way home. The case of bankers issuing notes payable at their banks, as in *Sanderson* v. *Bowes*, may be one of these cases; but I deny the alleged analogy between bills of exchange and promissory notes. The maker of a promissory note may express his own terms. He is, as it were, drawer and acceptor; the note must be taken as he issues it. But, in the case of bills of exchange, the drawer has a right to an unqualified acceptance, and an indorser in *in transitu* is entitled to the same right. If these acceptances were construed as special, and as qualifying the general liability of the acceptor, who is bound to pay, it would hurt the credit of bills. The acceptor is the person whose credit principally supports the bill; he is considered as always liable; but, if an accidental or careless omission to call at the place appointed destroy the acceptance of the bill, the confidence attached to the acceptance is gone, and the credit depends on the punctual observance of the terms of the condition. The proof of a demand and refusal is not easy, and, in many cases, might fail, or be brought in doubt by contradictory evidence. The case of *Sanderson* v. *Bowes*, then, can hardly be said to be impugned by that of *Fenton* v. *Goundry*. At all events, the former case may be considered as wanting the weight of the latter; but, it is sufficient to distinguish them by the difference of the subject matter of each case. It is, thirdly, said, this is an order on

(a) In *Parker* v. *Gordon*, 7 *East*, 386.

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the banker: I grant, that it is an authority to the banker to pay, and, in effect, an order; but we must not, by refinement, stagger prevailing notions. If it be an order on the banker, *Bishop* v. *Chitty* is a dangerous precedent: no man of business ever thought that such a note or memorandum converted the bill of exchange into an order on the banker; and, that by not calling at the banker's, he lost the benefit of his acceptance, and took the credit of the banker in the place of the acceptor! As to the cases in the Common Pleas, I shall not oppose to the case of *Ambrose* v. *Hopwood* (*a*) that of *Huffam* v. *Ellis* (*b*), in the King's Bench, and House of Lords; in the latter, the declaration followed the case in the Common Pleas, and the words, according to the tenor, might include the house. In *Callaghan* v. *Aylett*, and *Gammon* v. *Schmoll*, is to be found the great counterpoise to the authority of the Court of King's Bench; but, I must say, that the reasons given are not such as belonged to the authority of the judges, who are reported to have given them. In *Callaghan* v. *Aylett*, Mr. Justice *Heath* says, "there can be no difference in this respect between an action against the drawer, and an action against the acceptor." But, there is this difference, when the acceptor accepts "payable at the house," he means to limit his ubiquity by saying, that he is to be found there for the purpose of payment; and if the holder do not seek him there, he makes default in calling on the acceptor. If, without such direction, the holder omit to call at the house of the acceptor, he cannot, on account of that omission, charge the drawer or indorsers: but it is too much to say, that, by that omission, he discharges the acceptor, who is at all times liable, though no demand of payment was ever made, even at his house. Mr. Justice *Heath* avoids the authority of *Saunderson* v. *Judge*, by saying that, there "it was a memorandum at the foot of the note, not a part of the instrument." That leads to nice, I had almost said, frivolous, distinctions; for, according to that doctrine, if I say, "I accept, *R. G.*" and add at the foot of the bill, "payable at Messrs. *G.* and Co.," it is a mere memorandum; but, if I say, "I accept, payable at Messrs. *G.* and Co.," it is embodied in my acceptance, and forms a

(*a*) 2 *Taunt.* 61.
(*b*) *M.* 51 *G.* 3. *K. B.* See *Bayley on Bills*, 98. *n.* 1. 3d ed.

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condition precedent. Does it make a difference, that, in one case, the acceptance is all in one tenor, as "I accept, *R. G.* payable at my bankers," and that, in the other, I write, "I accept, *R. G.*," and, underneath, "payable at my banker's?" A man, whether he accepts in the former or latter form, means the same thing; for when he writes the words "payable, &c." he is usually determined in what place to write, by the room or vacancy on the paper: are the minds of men in business to be harassed with such untenable and inseparable distinctions? In *Gammon* v. *Schmoll*, Mr. Justice *Chambre* puts the case of a bill drawn upon a judge just going the circuit. I dare say, it has happened to him as it has happened to me. But, can it be supposed that any man of character on such or like occasion would make his bill so payable, if he had not cash or credit at his banker's? And who would refuse to call at the banker's? No holder in his senses would forbear to follow the directions of the acceptor, because it is undoubtedly done for his convenience; no man in his senses would refuse an application to the banker of the judge, where he would be sure of his money, for the gratification of coming down to *Exeter* for the sake of arresting him: but, if it turn out that an acceptance, payable at a particular place, is a mere shift, or act of roguery, it would be idle, and, in some instances, (as in directions to obscure corners and streets,) almost impossible, to attempt to find out a sneaking lodger in a garret to satisfy this indispensible condition. What holder, or what attorney, would arrest a man of credit under such circumstances, or would disgrace a judge? Such acceptances will always give credit to bills; and the practice will continue, though your Lordships should decide that they do not *qualify* the general liability of an acceptor; and, perhaps, the mercantile world will thank your Lordships for not imposing upon them the knowledge of precedent conditions, or a speculation, as to the different positions on a note, by the occupation of which the words "payable at, &c." become either a mere memorandum, or a condition precedent. But cases might be put of vexation; these may all be met by way of defence. It is said, (1 *Rolle's Abridgment* 444;) and I take it to be law, "If the condition of an obligation be to pay 10*l.* at a given day at *S.*, he (the obligor) is not bound to pay in any other place;" and "so

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in that case the obligee is not bound to receive it in any other place;" and so *Coke, Littleton*, 211, "For, if the obligor then (that is, when by notice the obligor has fixed the place) and there tenders the money, he shall save the penalty of the bond for ever." But he saves only the penalty and costs; he must pay the debt. An acceptance is, by the custom of merchants, a debt; though, independently of that custom, neither debt nor assumpsit would lie, for want of consideration. But, in all these cases, the fulfilment of the condition comes by way of defence. The obligee is not bound in the outset to state his demand at the place; the Defendant must plead his performance of the condition, and, proving it, he is quit of the damages and penalty; but he must bring the money into court. Place may, undoubtedly, be essential; and here both obligor and obligee understand each other that so it is to be considered.

Graham B. 1st & 2d Questions.

In answer to your Lordships' third question, I am of opinion, that, if the holder of a bill for acceptance take an acceptance, varying in time or place of payment, where place creates inconvenience, and obstructs or impedes the circulation of the bill, or, when new terms or conditions are introduced, he makes it his own. This is obvious in the case of enlargement of time. So, if the acceptance be payable at *Paris*, *Dublin*, or *Edinburgh*, where the place is evidently made a condition of the payment; in such a case, I think that the drawer would be discharged.

3d Question.

In answer to your Lordships' fourth question, I am of opinion, that, if, in the case put, *C.* take an acceptance, materially qualified as to time or place, and *A.* dissent, and *C.* still keep the bill, he makes it his own, and cannot sue *A.* on his original debt: but, if *C.* give timely notice to *A.*, and immediately offer to return the bill to *A.*, I think his original cause of action would remain.

4th Question.

Once settle the uniformity of practice, and the evil is over. But, according to the law as laid down by the court of King's Bench, you have a plain simple declaration and proof. According to the law laid down by the court of Common Pleas, you have a new form of declaration, and a proof which, in many instances, may be difficult, and may lead to controversy and contradiction.

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RICHARDS C. B., in answer to the first question, expressed his opinion, that the holder of the bill in the present case was not bound to present it at Sir *J. Perring's* and Co. for payment, nor to aver presentment there.

Richards C. B. 2d Question.

To the second, that the acceptance of the bill in question was not a qualified acceptance, constituting an undertaking to pay the bill at the house of Sir *J. P.* and Co., but a general acceptance, constituting an undertaking to pay the same, every where, with an additional engagement or direction for the payment thereof at that house.

3d Question.

To the third, that, if the payee *C.* were, without the previous authority or subsequent assent of the drawer *A.*, to take an acceptance qualified as to time or place, by taking such an acceptance he would discharge the drawer *A.*

4th Question.

To the fourth, that, if *A.* were to refuse his assent to such a qualified acceptance, *C.*, having received the bill for the debt of 100*l.* due from *A.*, could not sue *A.* for the debt till he had re-delivered the bill to *A.*

Dallas C. J. 1st Question.

DALLAS C. J. With respect to the first of your Lordships' questions, namely, whether, in this case, the bill of exchange mentioned in the first count of the declaration, being therein alleged to have been accepted according to the usage of merchants, payable at the banking-house of Sir *John Perring* and Co. the holder was bound to present it at that house for payment, and to aver in the declaration that the same was presented there, I am of opinion, that the holder was bound to present it there, and so to aver in the declaration.

2d Question.

And, as to the second question, I think that the bill, having been so accepted, is, in law, to be considered as a conditional acceptance; and not as a general acceptance to pay, with an additional engagement or direction for payment at the house mentioned. And as the case, which has given occasion to your Lordships' questions, has arisen from contradictory decisions in the courts below, and as, in the recent cases, all that could be found of former decision has been brought under the consideration of the respective courts, and their disagreement in opinion has still continued, and continues, (as appears from the answers hitherto given

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to your Lordships' questions,) it is obvious, that the present is a case which can very little depend upon mere authorities; the authorities have, however, been already fully referred to, and my reasons will, therefore, chiefly and shortly be given upon general grounds. And, first, I admit the presumption of law to be, (though, in the present state of commerce the fact is frequently otherwise,) that the drawing a bill of exchange pre-supposes an antecedent debt, and the acceptance is an admission, that such a debt is due. And, so considered, it is, no doubt, clear, that, the debtor may be called upon to pay without reference to time or place. But, if, in the bill itself, the drawer were to name a particular place for payment, instead of such place being specified in the acceptance only, such bill would be a bill qualified as to payment both with respect to time and place. And, the acceptance being according to the tenor of the bill, the acceptor, as to payment, would be bound accordingly. This, I am aware, would be the act of the drawer himself, and, therefore, not falling within part of the reasoning, as it applies to the acceptor, a distinction, to which I shall, hereafter, advert more fully. It is, I apprehend, equally clear, that, by a bill drawn generally, the drawer transfers his rights against the drawee, as modified by the bill, to the extent of the bill; and, that the drawer may enter into any contract with the payee, which the drawer might have done with the drawee before such transfer made, not affecting, thereby, in substance, the rights of the drawee. I assume, therefore, for the present, that, if the bill had purported to be an order to pay at the house of *Perring* and Co., and the acceptor had accepted such bill, he would not have been bound to pay elsewhere, till application for payment there, had been made and failed. I shall endeavour to show, hereafter, that what the drawer may do by the bill, as between him and the drawee, as between the acceptor and the payee, may be done by the acceptance. To take, first, the case of the drawer of the bill: he may draw it in any form which he thinks fit, provided the form be such as is warranted by the usage of merchants, without which it will not be a bill of exchange; but, it will scarcely be contended, that drawing it restrictive as to place of payment would be a violation of such usage. A bill general and

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and absolute in the first instance drawn and accepted generally, operates according to the terms of the bill; and the bill itself need only to be looked to, the acceptance referring to and not varying from the bill. But, to a bill so drawn, the drawee may refuse acceptance; and he may propose to accept conditionally, the payee being at liberty to receive or refuse such conditional acceptance; if he refuse, he must go back to the drawer, who will have his remedy against the drawee, and in this, the first and most simple view of the subject, the bill itself is at an end.

Suppose, however, the case of a partial and qualified or conditional acceptance; and, that an acceptance may be such in many respects, has been admitted by all the learned Judges in succession: indeed the very questions put by your Lordships recognize the distinction and adapt themselves to it. What, then, is meant by conditional acceptance, or in what respects may an acceptance be conditional? It may be so as to time, as to sum, as to place, as to mode of payment. It will be sufficient to refer to the authorities which have been cited as to each of these shortly, and one will be sufficient under each head; and I mention them, not because the point itself is doubtful, but for what is said in each case. And, first, as to amount. A foreign bill was drawn upon the Defendant, and he accepted it to pay a £100, part thereof; he was sued on the acceptance, and, on demurrer, insisted, *that a partial acceptance was not good within the custom of merchants;* but the Court held otherwise, and judgment was given for the Plaintiff. (a) Next as to time. A bill was drawn and no time fixed for its payment; it was presented on the 18th of *April*, and accepted payable the 8th of *September;* this being stated in the declaration, the defendant demurred, and insisted, that, as no time was prescribed for payment, the bill was payable at sight, and that a promise to pay two or three months after sight was not an acceptance within the custom of merchants; but the Court held that it was an acceptance within the custom, and the demurrer was over-ruled. (b) Thirdly, as to place. On this point, also, there are numerous authorities; but, as it is, in this respect, that the present contro-

(a) *Wegerstoffe* v. *Keene*, *Str.* 214.
(b) *Walker* v. *Attwood*, 11 *Mod.* 190.

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versy has arisen, I assume only, at present, that this also may be conditional, reserving myself to examine the authorities and doctrine hereafter. Lastly, as to mode of payment. A bill was accepted to be paid half in money and half in bills, and the question was, whether there could be a qualification of an acceptance? And it was proved by divers merchants that there might be, for that he, who might refuse the bill totally, might accept it in part; but, that the holder was not bound to acquiesce in such acceptance, *Petit* v. *Benson.* (a) If, then, there may be a conditional acceptance as to sum, as to time, and as to mode of payment, such acceptance, as to these, qualifying the liability to pay, it is difficult to conceive why there should be any difference as to place, at least as between the acceptor and the payee so taking the conditional acceptance; nor do I conceive, speaking with deference to other opinions, that there is any distinction which, upon principle, can be supported. Losing sight of place, however, for the moment, let the effect of a conditional acceptance be examined in the other respects already mentioned. And first as to amount; he who takes an acceptance for less than the sum expressed in the bill, cannot claim from the acceptor more; though, as to the drawer, how it may affect him will form matter of distinct consideration. So, as to time, the holder is likewise bound by the terms under which he has consented to take the acceptance: and why? Because, on the one hand, the payee not being bound to take an acceptance except according to the tenor of the bill, and, on the other hand, the acceptor being only bound to accept as he may chuse to accept, when the acceptance varies from the tenor of the bill, and the payee, notwithstanding, takes such acceptance, he consents to take the bill according to the tenor of the acceptance, and not according to the tenor of the bill.

So it is as to sum, as to time, as to mode of payment; in each of which cases, the acceptance, it is admitted, forms the contract between the immediate parties. Is there, then, any difference in this respect, as to place, and as to place only? In the argument at the bar, (and herein the case seems to me now narrowed to a single point,) it has not been disputed, that there may be a conditional acceptance

(a) *Comb.* 452.

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as to place, restrictive of payment, and making presentment necessary at such place, provided it be by words of express and unequivocal import; but it is denied, that to make a bill payable at one place, is an exclusion of others; and in *Fenton* v. *Goundry*, I observe, Mr. Justice *Holroyd*, who there argued against the restricted liability, seems to have taken the same distinction. "The case has been argued (he said) as if the terms of the acceptance had been payable at *Sikes* and Co.'s *only*," not contending, that if so drawn, the payment would not have been restricted; and Lord *Ellenborough* is made immediately to observe, "Is it more than an expansion of the promise?" An observation, which his Lordship could not have made, if, by the word *only*, the promise had been, in terms, restricted; and, in the same way, in the case of *Gammon* v. *Schmoll*, in the court of Common Pleas, it was not denied at the bar, that, if the acceptance had been at the place named, and not elsewhere, in such case the acceptance would have been clearly qualified, and conditional and restricted as to place. And so, yesterday, it was admitted by my brother *Holroyd*, and so, to-day, it is admitted by my Lord Chief Baron (a). The question, therefore, in this view of the subject, comes round to be merely a question of construction, namely, what do the words of acceptance import in the particular instance? and are they conditional as to place of payment or not? There are no technical words, by which, generally speaking, a condition must be created; and, whether it be a condition precedent, a concurrent act, or a mutual promise, must be collected from the intention of the parties, reference being had to the words made use of, and the subject matter in question. And so again, it has been admitted by both the learned judges to whom I have last referred. "Intention (said my brother *Holroyd*, in express terms) is that which ought to govern." "What did the parties mean?" (said my Lord Chief Baron). Now conditional or qualified, as opposed to absolute, I can only say, imports some qualification or restriction of that, which would be otherwise unconditional. This is self-evident, it will be agreed, when the condition is established; but so to

(a) Two days (the 6th and 7th July), were occupied by the Learned Judges in giving their opinions.

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state it, it is said, is but begging the question, or leaving it at least where it was before, the question being, whether the words operate by way of condition, and not upon the effect of the condition when established. Still, however, I can only say, the very departure from generality of expression to me, imports some modification of that generality; and, if simple and absolute acceptance have a clear and simple operation, and will bind a party to pay wherever his acceptance may be presented, it seems to me but reasonable to intend, that, when he accepts, payable at a particular place, he means to exclude, in the first instance, a liability to demand in any other place. And, looking to intention, and taking as admitted, that it ought to govern, I cannot permit myself to doubt, that the words made use of in this instance are, in fairness of construction, just as clear as if express words of restriction had been introduced. The maxim referred to from Lord *Bacon*, by my brother *Holroyd*, (I speak it with deference) appears to me too technical as applied to such an instrument as a bill of exchange; nor would it govern in another view; for, in a promissory note, it is agreed, that express words of restriction are not necessary; words of appointment and specification being of themselves sufficient. In none of these is the word "only" to be found, nor any words beyond those which belong to this particular case; and yet, the rule of construction, as mere construction, must, in each instance, be the same. I think this upon the mere ground of the words themselves, but I think so, still more strongly, on the sense and reason of the thing. I will, first, put the case of a bill accepted payable in a town different from that, in which the abode of the acceptor may be, as for instance, and to avoid extreme cases, a bill accepted in *Birmingham* payable in *London*; and I will, farther, suppose it to be a bill, according to the original simplicity of such transactions, that is, for an antecedent debt from the acceptor to the drawer of the bill. By his acceptance payable in *London*, the acceptor promises to have a fund in *London*, when the bill shall be presented; he may have sufficient to pay the bill, but not beyond it, and yet, according to the argument which would reject the words of specification as words of limitation, he must have that which he may not possess, that is, a double sum or sums, one forthcoming in *London*, and another

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other in *Birmingham*, to take his chance as to the place where, in fact, the bill may be presented when due; or be left exposed to an arrest, as the immediate consequence of non-payment. I am aware, it may be said, that such would be his situation under the original debt to the drawer, and that such would continue to be his situation under a general acceptance; but, it is for the express purpose of guarding against this, and on other grounds of personal and commercial convenience, to which I shall presently advert, that the practice has obtained of partial and qualified acceptance as to place, and to which, as between the immediate parties, I do not see any possible objection. It has been very properly said, in one of the cases cited at the bar, the convenience of the thing is generally in support of such qualification; most persons keep their money at their banker's, and make all their payments there; there, they, or their appointed agents for this purpose, are to be found, and there, if any where, is the fund out of which the payment is to be made. To this it may be added, that the very prevalence of the practice proves the convenience; and though I will admit, that mere concurrence is not to make the law, yet, in all commercial transactions, it is greatly to be regarded, as the footing and foundation on which men deal together; and the course of such dealing, as between merchants, is often that which of itself constitutes the law. It is scarcely necessary to refer to the stronger cases of a bill accepted in *London* payable in *Dublin* or *Edinburgh*, or a bill accepted in the *West Indies* payable in *London*. And suppose that, in this latter case, the party accepting has remitted to his correspondent in *London* the produce of his plantation, for the express purpose of meeting the bill, will it be said, that, notwithstanding, he may still be arrested in the *West Indies*, because, for the original debt, he was liable to be arrested any where? And yet the argument which treats as of no effect specification of place of payment, stops nothing short of this extent. Nor do I see, in any one respect, where the line is to be drawn or the distinction to be made. If, then, it would be so in the instance of a bill accepted in one town payable in another, or in one country payable in another, let the case be considered of a bill, the parties living in the same place, and accepted payable at a particular banking-house. It is scarcely

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necessary to say, that to the holder it can be no inconvenience to present it there; but on the other hand, I admit it would be scarcely any inconvenience to the acceptor to have it presented at his counting-house, or place of abode; for, even if it were an absolute acceptance, it would still, according to all probability, be paid by a draft on his banker, the acceptance on the bill only operating as such order; but, even in this view, it weighs something, though possibly not much, that this would be to subject the payment of a bill to a double instead of a single operation, namely, the having two places to apply to instead of one; and, though this would be an inconvenience imposed upon the holder by himself, still that which is not in the natural course of dealing, raises a presumption that such departure from it was not meant. And what would be thought of the conduct of a holder, who, having a bill payable at a banker's, instead of going there, should go to the house of the acceptor merely to get his draft for the bill, or should, further, insist on a specific payment in money or bank-notes?

To wind up, therefore, what I have to observe upon this part of the subject, on the reason and fitness of the thing, on principles of justice and mercantile convenience, and from the very nature of such transactions, I think a particular place of payment, being part of the acceptance of the bill, imposes upon the holder, because he is the willing holder of such acceptance, the necessity of presenting it, in the first instance, there; and leaves the acceptor only liable to pay, where he has provided and fixed a fund for payment, and has consented to pay, in order that he may not be called upon to pay where he has no such fund, nor given any such consent. Nor can I quit this part of the subject without adding, that I do not see a possible inconvenience which can result from so deciding; for the holder need not take a bill so accepted; and where the remedy is so obvious, and it turns simply on such a point, except that confusion in this respect has crept into the subject by disagreement in the decisions of courts of law, and that it is fit the law should be settled and uniform, the question seems to me hardly worthy of the attention which it has excited, and the consideration which it has undergone.

Deeming, then, presentment at the appointed place to be a condition precedent, I will only further say, that I think

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it necessary that such presentment should be averred and proved; and, that non-presentment and having funds ought not to come by way of defence, as, in the case of promissory notes, has been decided by all the courts in *Westminster-hall*, and from which, notwithstanding what I have heard this day, I do not myself feel disposed to dissent. Presentment, according to Lord *Ellenborough* (a), at the appointed place, is a condition precedent; and for want of such an averment, the declaration is bad. The argument, therefore, as to this point, resolves itself into the question, whether condition precedent or not? For, admit it to be so, then, in this respect, there is no difference between the two courts, and the cases of promissory notes apply to bills of exchange; while, on the other hand, if it be not a condition precedent, it is, of course, not necessary to be averred.

Quitting now the general ground, I come next to the analogies which result from other cases mentioned, if not of the same, yet of a similar description. And first as to promissory notes: it is scarcely necessary to advert to what has been said as to the similarity, or the distinction between promissory notes and bills of exchange. In some respects, undoubtedly, they are different, in others it may almost be said they run into each other. A bill has, indeed, generally, three parties, the drawer, the drawee, (if accepting, becoming the acceptor,) and the payee; but there may be only two parties, as where a person draws a bill on another payable to his own order, and this, in legal operation, is rather a promissory note than a bill. It is usual, however, to declare on it as a bill; not admitting the identity of drawer and drawee; and, if accepted, the Defendant may be charged in one count as the drawer, in another as indorser, and in the third, as the maker of a promissory note. I forbear to allude to the cases, which turned upon the distinction, in the address of the note, between "at" and "to," in one of which it was said by Lord *Ellenborough* (b) — "This is properly declared on as a bill of exchange, though it might have been treated as a promissory note, at the option of the holder;" and, in

(a) In *Sanderson* v. *Bowes*.

(b) In *Shuttleworth* v. *Stephens*, 1 *Campb.* 407.

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another of which (*a*), it was observed by Lord Chief Justice *Gibbs*, "It would be difficult to say, in most cases, that what is law, as regards bills of exchange, is not law as it respects promissory notes:" but paramount in point of application is what was said by Lord *Mansfield* in *Heylyn* v. *Adamson* (*b*) and which has been so often mentioned, that I shall content myself with merely referring to it.

Such, then, being the similarity, and, in some instances, the identity of promissory notes and bills of exchange, let it be seen what has been determined with respect to promissory notes; premising only, that, here, at least, there is no clashing of authorities: for though the decisions in the King's Bench, as far as respects promissory notes, are denied to have application to bills of exchange, the decisions in the Common Pleas, as to bills of exchange, of necessity include promissory notes; and so far, then, as concerns promissory notes, there is no difference of opinion whatever. What then has been decided respecting promissory notes? In this, the decisions of the two courts agree; namely, that a promissory note, containing in the body of it, a promise to pay at a particular place, requires a demand of payment there, in order to give the holder a cause of action if it be not paid. Now on what grounds of reasoning do such decisions stand? To take one case of the many, — In *Sanderson* v. *Bowes*, it is said by Lord *Ellenborough*, "An action on a note will not lie unless the Plaintiff has demanded payment at the appointed place. And I cannot but say, that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient, that the makers of notes of this description should be liable to answer them every where, when it is notorious that they have made provision for them at a particular place, where only they engage to pay them;" — and, having thus stated the ground of convenience, his lordship added, —"then if the request at the place be a condition precedent, it should have been averred, and, for want of such an averment the declaration is bad." Apply this doctrine to bills of exchange. — If convenience require that the makers of promissory notes should be liable only where they have expressly made provision to pay, how

(*a*) *Richards* v. *Milsington*, *Holt*, *N. P. C.* 364. *n.*
(*b*) *Burr.* 669.

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is it possible, in this respect, to distinguish promissory notes from bills of exchange? Is not the convenience precisely the same in the one case as in the other? — and, being the same, how is it to depend on the form of the instrument? Call it what you will, or make it what you may, it is in payment, in each instance, that the transaction is to end, and the note or bill is the means, and nothing more, by which payment is to be procured; as far, therefore, as to a particular place of payment being pointed out, or a specific place of deposit being established, the reasoning applicable to each is precisely the same, and it seems to me impossible to distinguish between the two. An expression of Lord *Ellenborough*'s has, however, been much observed upon, namely, "that a specification of place is but an expansion of the promise to pay." It will not be supposed that I mean to follow any of the verbal or critical remarks which have been made in this respect, at the bar, or in the courts below. Whatever peculiarity of expression might, at times, belong to this noble and very eminent person, it was, generally speaking, a peculiarity of force adapted to his peculiar vigour and energy of thought. But, to the substance of the expression as authority, it will be necessary to advert, in order to see how it has been understood and explained by those, who have applied it in support of the doctrine of non-restricted acceptance. In *Gammon* v. *Schmoll*, the leading counsel at the bar, who was to support the doctrine of universal liability, explained it in this way, "every general acceptor has a double liability, he is in default, first, if the bill is presented to him, personally, wherever he may be, and he does not pay it; secondly, he is in default, if it be presented at his place of abode, and not paid: to these, by a qualified acceptance, he adds the obligation to pay it, if it be produced at the place," that is, the place specified. He must be prepared "with *triple* funds to pay the bill, as well where his person is, as where his abode is, and also, at the particular place mentioned: this is what Lord *Ellenborough* means by an expansion of the promise." This is a complication of expansibility which seems to me a strange departure from simplicity of proceeding; and, for myself, I can only say, I would not so understand it, if I could understand it to any other effect; but it is impossible to deny, whatever might be intended by the mode of expression itself, that in sum and sub-

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stance, it does not amount to this. But whether every man who accepts a bill of exchange, by his acceptance at a specific place undertakes to pay at every other place if required, and to have a triple instead of a double or a single fund to the amount of the bill accepted; or whether he makes his own situation worse, by making that of the holder, in one respect at least, better, that is by pointing out to him a definite place of payment, instead of leaving him to search where he, the acceptor, is to be found, when the bill becomes due, it is not for me to pronounce, but for your lordships to consider. Or why, again, this should be in the case of a bill of exchange and not of a promissory note, is that which I am not able to understand.

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I now come to that, which it is said, however, makes the distinction between bills of exchange and promissory notes, so as to make the reasoning as to the latter inapplicable to the former. And this distinction is said to consist in the form and nature of the respective instruments. First then as to the *form*. In a promissory note, it is said the words are incorporated in the very body of the instrument, which creates the contract and duty of the party; whereas, in a bill of exchange, they are no part of the bill itself, but distinct as acceptance, and collateral to it. A promissory note is merely the promise of the maker; the acceptance of a bill of exchange is a compliance with the order of the drawer. To a promissory note there are but two parties: to a bill of exchange there are three, and the drawer has rights as well as the acceptor and payee. And to this I agree. But here again, at least, as between the acceptor and the payee, there is no distinction. In each instance, a debt must be pre-supposed, and in each, it is an undertaking to pay; it is said, that in the case of a promissory note the instrument creates the contract; and, no doubt, it does, that is, the contract to pay in the particular manner, but not the antecedent debt; the obligation to pay existed anterior to the note; and, though, in the case of a bill of exchange, the debt had also pre-existence, the precise obligation to pay is created by the acceptance, and, be it promissory note, or be it bill accepted, it is, in each instance, but a promise to pay; and, without such promise the bill itself, as to the acceptor, would be a mere nullity.

To advert, however, to the situation of the drawer, (and this

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this brings me to the third question, which your lordships have been pleased to put,) namely, whether, if *A.* draws a bill upon *B.* in favour of *C.*, and *C.*, without the subsequent assent of *A.*, takes an acceptance of the bill for the whole sum, but an acceptance qualified as to time or place of payment, *C.* could, notwithstanding such acceptance, maintain an action on the bill against *A.* And, first, with respect to time: in this the learned judges all agree, that giving time will discharge the drawer. Extending the time mentioned in the bill would be giving more time than the drawer has said by the bill he chooses to give, which, as against the drawer, the payee can have no right to do; and, taking an acceptance at a shorter date, if, in case of non-payment, it would give an immediate action against the drawer, would, thereby, make him liable sooner than he undertook to be; he being liable only in case of non-payment by the acceptor, and this at the end of the stipulated time. I need scarcely add, it would be the same as to place, if place, from its nature, should resolve itself into time. It remains, therefore, only to consider place as unconnected with and independent of time. And, so considered, it may, or it may not, be material to the drawer. Suppose all the parties to live in the same town, whether the bill be accepted at the counting-house, or at the banking-house, can make no real difference to the drawer; in other cases, from distance, it might be material; but, at all events, I think, that if it put the drawer under greater difficulties than he otherwise would be under in point of proof of proper presentment, if bringing an action himself, it is a difficulty which I hold the payee has no right to impose upon the drawer, whose rights should remain unaltered as ascertained by the bill: whether those rights were altered or not would depend on the particular case. Perhaps, however, it would be more reasonable and convenient than making it depend on situation in each particular case, which might generate innumerable questions and give rise to great uncertainty, to hold, at once, the drawer discharged, the payee having taken such acceptance without notice, and thus acting at his own peril; and thus, all inconvenience would be guarded against, by making it necessary to give notice to the drawer.

4th Question.

With respect to the last question, I am of opinion, that, under the circumstances stated, *C.* could not maintain an

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action against *A.* without delivering up the bill, and this for the reasons given by several of the learned judges, and which I do not feel it necessary to repeat.

In the above observations, I may appear to your Lordships to have built much on the decisions as to promissory notes; but, it has been said, these decisions themselves, perhaps, in point of law ought not to have taken place. To this I can only answer — first, that it is impossible for me to doubt of the validity of these decisions, numerous as they are, recognized and confirmed as they have been by every court, and never, in a single instance, having till this day been drawn into doubt by even a single judge. If the law so settled is now to be considered as unsettled, I know not on what foundation, in point of law, any decision can stand: but, *here*, disclaiming even those decisions as decisions, and recognizing only the principle on which they proceed, I say, that, if the case of a promissory note were to occur *now* for the first time, it ought to be decided as those cases have been decided; and further, that, without deriving authority from the decisions as such, the principles on which they have proceeded, and ought still to *rest*, apply equally, in my judgment, to bills of exchange. On the whole, therefore, my opinion is formed, as to bills of exchange, even without reference to the decisions as to promissory notes; and still less have I referred to the cases of promissory notes, for the purpose of proving the decisions of the court of King's Bench inconsistent each with the other, but for the purpose of respectfully adopting the decisions of that court where they agree with the decisions of the other courts, and thus affording principles decisive, in point of law, of the same question as to bills of exchange. And here, without repeating what has been said by other judges in answer to the cases put of actions in debt on bond, or demand of rent, I will only further say, that these do not appear to me to be cases analogous to bills of exchange, which depend on peculiar and appropriate grounds of commercial law, altogether distinct and different, and which, it must be agreed, the custom and usage of merchants is to decide. And this leads me to the only point on which (independent of the different opinion entertained by several of the learned judges, and of the very able reasons by which their judgments have been supported) I am bound to say I feel some degree

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of difficulty; and that is, as to what has been said of the understanding and usage of merchants with respect to the question under consideration. If qualified acceptances as to place have hitherto circulated on a settled and general understanding, that place does not operate by way of limitation as to payment, as far as concerns your Lordships' first question, which points to the usage of merchants, I am bound to admit, that I ought to have answered differently; and, further, that, if so, the greatest part of my observations fall to the ground. Looking, also, to your Lordships' second question, the consequence would, I apprehend, be the same, that is, as to the legal effect; for a bill of exchange, being altogether the creature of mercantile usage, recognized, however, by the law, such usage would constitute the law as applicable to such an instrument: it is not to be overlooked, that it has been asserted by high authority, that, in circulation and practice, supported by mercantile opinion and understanding, a conditional acceptance does not operate as I conceive it to do. Not meaning to doubt that such information has been given; still, if the decision is to turn on this single ground, I could wish the fact in some way or other to be regularly ascertained. I will take the law from the learned judges, whose office it is to expound the law; but, if the law is to depend upon fact, and fact on testimony, I desire, if possible, to have testimony through the regular channel. This creates a difficulty with me, subject to which, I will only in conclusion add, that, for the reasons which I have given, I adhere to the answer, which I have humbly presumed to submit.

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ABBOTT C. J. In answer to the first and second questions proposed by your Lordships, I am humbly to acquaint your Lordships, that I think the defendant in error was not bound, in order to entitle himself to sue the plaintiff in error, who is the acceptor of the bill in question, to present the bill for payment at the banking-house of Sir *John Perring* and Co., nor to aver in his declaration that the bill had been so presented; for, I think, the acceptance is not to be considered in law as a qualified acceptance to pay the bill at the house of Sir *John Perring* and Co.; but, as a general acceptance to pay the same, with an additional

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direction to the holder to call for payment at that house, instead of calling at the house of the acceptor, as he would otherwise do.

These two questions, my Lords, appear to me to depend entirely upon the meaning and import of the words "payable at Sir *John Perring* and Co.'s, bankers." There can be no doubt that the drawee may qualify, because he may refuse his acceptance. The question is, whether he is to be considered as having done so by this expression? I conceive, that the true meaning and import of all phrases is to be sought in usage, rather than in a strict and literal interpretation of the words of the phrase; and, that, in mercantile instruments, the usage of trade and commerce is that to which we are to resort. Your Lordships well know, that there are many words and phrases in all languages, of which the meaning varies with the subject and occasion to which they are applied. I shall take leave to postpone the delivery of the grounds of my opinion on these two questions, until after I have troubled your Lordships with my opinion on your Lordships' third question, and the reasons of that opinion.

3d Question.

My Lords, I understand the expression "take an acceptance," as used in this third question, to mean consent to such an acceptance; and, so understanding it, I am of opinion, that *C.* could not, in the case proposed, maintain an action upon the bill against *A.*, upon refusal of payment by the acceptor. There is not, I apprehend, any doubt or difference of opinion upon so much of this question as supposes an acceptance qualified as to time: and, in my humble opinion, a qualification as to the place of payment has the same effect as a qualification as to the time of payment.

I conceive, my Lords, that, in estimation of law, all bills are to be considered as drawn for value, if not actually in the hands of the drawee at the time of drawing, (which seems to have been usually the case in the infancy of those instruments), at least intended by the drawer, and expected by the drawee, to be placed in the hands of the latter before the maturity of the bill. And a person, who draws a bill under such circumstances, may be permitted to elect for himself the time and place of payment; because, if the drawee should refuse to pay, according to such election, he

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would be able to sue him for the sum which constitutes the value of the bill, either immediately, if the value has been previously received, or so soon as it shall be received according to the intention upon which the bill is drawn. By an intention to place value in the hands of the drawee, I mean an intention to place it in the course of some mercantile transaction between the parties, such as the consignment of merchandize in pursuance of orders of the drawee, constituting the relation of seller and buyer; or a consignment for sale on account of the consignor, constituting the relation of principal and factor or agent; and not a mere promise to provide for the bill at maturity, by the transmission of money or other bills for that special purpose. The latter practice has, indeed, prevailed to a great extent in modern times; and bills of exchange have become rather instruments for raising money, or postponing payment of debts by a fictitious credit, than instruments of real mercantile transactions. But, notwithstanding such practice, I apprehend, they are to be considered in courts of law as founded upon real and mercantile transactions, according to their primitive object and use; because, if they are to be considered as founded upon other transactions, or to be governed by other principles, they will cease to be according to the usage and custom of merchants, upon which usage and custom alone their validity in the law of *England* depends; and which is referred to in every declaration in an action upon a bill of exchange; and, if the drawer of a bill has a right to elect in this manner the time and place of payment, I think it cannot be competent to any holder of the bill to substitute a new election of his own, and to consent to any variation in these particulars, without the assent of the drawer, either precedent or subsequent. The holder cannot consent to an enlarged time of payment, because, in the interval, the drawee may fail, and he cannot be allowed to enforce the drawer to prolong the credit beyond the period that he himself may have chosen, nor can he consent to abridge the time, because, by so doing, he will obtain an earlier recourse against the drawer, than the drawer intended to give. A bill of exchange is ordinarily addressed to the drawee at his usual place of trade or residence, and it is to such a bill that I understand your Lordships' question to refer; this address, however, is intended only as a direction to the payee or holder as to the place where the drawee may be

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found, in order that the bill may be presented to him for acceptance and payment; and not as a designation of a precise or definite house or place of payment. And, consequently, a general acceptance of the bill, leaves the bill according to its original tenor, and does not add any designation of the place of payment. Any introduction, therefore, of a definite and precise place of payment, at which alone the presentment is to be made, is a departure from the generality of the bill; and the holder, who consents to take such an acceptance, does, by that act, consent to narrow what the drawer had left at large, and to fix a single place for the demand of that money, which, but for such his act, would be demandable by the drawer, or for his use, anywhere and everywhere. To such a limitation, I humbly conceive, that the drawer has a right to object, and, consequently, to say to the holder, that, by so doing, he has taken the drawee for his own special debtor, in exclusion of the drawer, or, in common speech, he has made the bill his own. I am aware, my Lords, that, upon a refusal to pay at the designated place, the acceptor of the bill becomes a debtor, generally; but, then, in order to enforce that general obligation, either the person who seeks to enforce it must prove the refusal; or, at least, (and which, in my opinion, is the more correct view of such a case,) the party, against whom the general obligation is sought to be enforced, may, by way of defence, allege and prove that he was ready with the money at the day and place appointed, and has at all times since been ready with it. I am aware, also, my Lords, that, in the case supposed by this your Lordships' third question, which is the case of a bill made payable to a person named therein, the drawer cannot sue the acceptor upon the bill, without averring and proving a presentment for payment by the holder to the acceptor, and a refusal of payment by the latter; and I am sensible, that, in many instances, it may be a matter of entire indifference to the drawer, whether he shall prove a presentment for payment at the place specially designated by the acceptance, or at the place of abode or usual business of the drawee, to whom he has addressed his bill. But, though this may be a matter of indifference in many cases, it will not be so in all; if we suppose the drawee to live in some street or square in *London* or *Westminster*, and to designate another place of payment in some other street or square, in either of those cities,

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the proof of a presentment at the place designated may be as easy as the proof of a presentment at the place of residence or business: but, if we suppose the drawee to live at *London*, and to designate *Salisbury* or *Exeter* as the place of payment, or *vice versâ*, the proof may not be so easy to the drawer, who may have connections in one of those cities, furnishing an opportunity of finding the witness who made the presentment, and no such connections in the other; for there is frequently no sort of connection between the drawer and ultimate holder of a bill; the latter is often a person wholly unknown to the drawer. This difference may be considered, generally, as varying, and increasing or diminishing, with the distance of the places, though not by that circumstance alone; and, if the effect of such a qualified acceptance be made to depend upon the convenience or inconvenience of the drawee in the particular case, a door will be opened to an infinity of questions, which cannot be answered but by reference to the distance of the places, accompanied also with an enquiry into the particular circumstances and connections of the drawee in respect of the places. And I apprehend, my Lords, that a rule of law, liable to such questions in practice, ought not to be established without an absolute necessity, especially in mercantile cases, which, above all others, require to be governed by plain, prompt, and easy rules. My opinion, however, upon this question is founded less upon considerations of particular convenience, than upon the general principle, to which I have before alluded, namely, that the drawer has a right to have from the drawee, considered as his debtor in the way that I have mentioned, a general and unqualified acknowledgment of his debt and promise of payment, and that no assignee of his demand can, without his assent, permit any limit or qualification at the dictation of the drawee, or by consent between those two persons. All that I have thus taken the liberty to offer to your Lordships in relation to bills addressed generally to the drawee at his place of abode or business, will, I apprehend, apply with increased force to bills, which by their original form and tenor require the payment to be made at some particular place designated therein, because, in these cases, an acceptance substituting another and different place of payment, will be a manifest departure from the declared intention of the drawer. There is, my Lords,

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another class or form of bills of exchange not noticed in your Lordships' questions, but to which I must beg leave to advert, because I conceive the considerations belonging to it to be fit to be submitted to your Lordships' attention on the present occasion. I mean, my Lords, bills made payable to the order of the drawer, or which is the same in effect, to the drawer or his order. If a bill so drawn be indorsed to another, without value, the indorsee becomes a mere agent of the drawer, and, of course, can never sue him upon the bill. If indorsed for value, either in the first, or any subsequent instance, the rights of the holder against the drawer do not differ from those arising on a bill drawn in favour of a person therein named. But the remedy of the holder, to whom such a bill may be returned for nonpayment against the acceptor, is, in some respects, different; the drawer of such a bill may, in this event, sue the acceptor by a special declaration, setting forth the indorsement and return of the bill, and, thereby, entitle himself to recover, in addition to the principal sum, the expence of exchange and re-exchange paid by him to the indorsee, which is the usual mode in the case of foreign bills: and, if he sue in this form, he must allege and prove a presentment and protest for nonpayment. But the drawer may strike out his indorsement, and treat the bill as having remained continually in his own hands unassigned, which is the usual practice in the case of inland bills; and, in such an action, I apprehend, it is not necessary to aver or prove a presentment for payment, the bill being accepted generally. I take this to be law, because, in all the numerous actions which have been brought upon bills of this description, I have never known a presentment for payment actually proved at the trial, nor the want of such proof, or of the averment, ever made a ground of objection in any stage of the proceedings. In the case of such a bill, therefore, it is obvious, that if the indorsee take an acceptance, qualified as to the place of payment, so as to render the proof of a presentment at that place necessary to the maintenance of an action by the drawer against the acceptor, he will, thereby, cast an additional burthen upon the drawer, if the latter can be compelled to take up the bill; and, I conceive, the law will not allow him to do this. I have detained your Lordships with the expression of my sentiments thus at length

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length upon the third question, because my opinion upon the first and second questions, to which, with your Lordships' permission, I shall now revert, depends very mainly upon the opinion which I entertain on the third question.

I consider an acceptance qualified as to the place of payment, to be followed by the consequences that I have mentioned, where the holder consents to receive it; and, if I am right in this, then the holder must, of necessity, have a right to refuse such an acceptance, because he cannot be compelled to take an acceptance, which may deprive him of his recourse against the drawer; and this seems to have been the opinion of those learned judges, who, in the decided cases, to which your Lordships have been referred, considered an acceptance like the present to be a qualified acceptance. If, then, the holder may refuse such acceptance, or if, consenting to take it, he loses his recourse against the drawer, I must say, I am, entirely, at a loss to discover, how it can have happened, that, in no one of the thousands and tens of thousands of bills which have been accepted in this form in *England* in the course of the last thirty years, any holder of the bill has ever refused to take such an acceptance, or any drawer contended, that he was discharged by the holder's consent to take it. I say, my Lords, that neither of those things has happened, because I have never heard of them either in or out of a court of justice. Upon this consideration, I am satisfied, that, according to the usage and custom of merchants, these words "payable at, &c." are not understood to furnish a qualification, or to import, that the acceptor will cause payment to be made, if the holder will present the bill at the place appointed, but not elsewhere, or otherwise. And I am particularly desirous to seek the meaning of these words in the usage of merchants at the *Exchange*, rather than in *Westminster Hall*; because a difference of opinion as to their meaning has, for some time, prevailed, not only among the judges now present, but, also, among some of those revered persons, who are, now, no more. I must, however, add, that the words themselves are not apt words of condition or exclusion; and that, if their meaning be doubtful, they are to be interpreted most strongly against the person using them, that is the acceptor; and the most strong interpretation against him is that which excludes,

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and not that which admits, the qualification. Much was offered at your Lordships' bar by the learned counsel for the plaintiff in error, as to the inconvenience which may ensue from the interpretation, which I put upon these words; especially, in the case of a gentleman or a lawyer, who should be suddenly called upon for payment at a distant place, after having provided and left funds in the hands of his banker to discharge his acceptance. But this supposed inconvenience appears to me to rest almost wholly in suggestion and imagination. If a bill addressed to a person at his place of abode be accepted generally, I apprehend, the holder may, if he will be perverse or foolish enough to do so, take out a writ against the acceptor, as soon as the bill becomes due, without calling at his house for payment, in like manner as any other person may do, who is a creditor for goods sold for the ordinary supply of a family; so that the supposed inconvenience is equal in both forms of acceptance, but, in practice, it can rarely happen in either; because the holder, who neglects to present his bill, loses his recourse against the drawer, which no prudent man will choose to do. And, if an acceptance in the form of the present, mentioning a banking-house, is to be deemed a qualified acceptance, I apprehend, the same interpretation must be given to the words, if a house of any other description be mentioned, such as the house of any agent or friend, or even the house or place of business of the drawee, if he happen to have two and the bill be directed to one of them, or if he be about to change his place of trade or residence, before the bill will become due: or, if the bill be addressed to him at his only place of residence or business, without the addition of his place of abode, as "to *A. B.*, merchant, *London*." There is, also, my Lords, another ground, upon which, it seems to me, as at present advised, that I might answer your Lordships' first question in the negative; and that is this: Admitting a place of payment to be specially designated by the acceptance, I apprehend, that the money is, nevertheless, due generally from the acceptor, and, that, in an action against him, his readiness to pay at the place appointed should be advanced by him as matter of defence by a special plea averring that fact, and bringing the money into court for the plaintiff's use, as in the common case of a plea of tender,

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der, (unless indeed he can excuse himself by shewing, that the money has been lost by the intermediate failure of his banker, which is a point of so much doubt, that I hope to be excused from giving an opinion upon it at present); and, according to the ordinary rules of pleading, a plaintiff need not allege any matter the want whereof furnishes a ground of special defence only, and not a general answer to his demand or general defeasance of his right, unless it be the case of a condition precedent, the effect whereof is to postpone the demand until the matter of the condition be performed; and, I have already observed to your Lordships, that the words "payable at the house of Sir *J. P.* and Co." do not appear to me to be proper words of condition. But I hope to be excused from expressing myself with confidence upon this point, by reason of the difficulty there may be in drawing an effectual distinction between the designation of a place of payment in the acceptance, and the designation thereof in the body of the bill itself, or in the body of a promissory note payable upon demand to the bearer, as was the case of *Sanderson* v. *Bowes*, and one or two others which have been cited at your Lordship's bar, and in which it was decided, that a presentment of the note at the place therein designated, was a condition precedent to a right of action for the money. If the like question shall ever arise again, I shall consider it with the utmost deference and respect to the great learning and talents by which those decisions were pronounced, though, at present, I am not, entirely, satisfied, that, even in the case of such a note, a readiness to pay at the appointed place is not properly matter of defence alone. It is, I hope, sufficient for me to say at present, that the words of the instrument now in question are not precisely the same, and that they are found in an instrument of a different character, namely, in a bill of exchange; wherein a time certain is appointed for the payment, and of which, as before observed, I think the acceptance must be considered as given, in pursuance of an antecedent duty to the drawer, assignable by the custom of merchants, and not as creating a new duty in itself, which, in the case of *Sanderson* v. *Bowes*, the promissory note was considered to do.

4th Question.

In answer to your Lordships' fourth question, I shall not trouble your Lordships further than to say, I am of opinion,

nion, that an action could not be maintained under the circumstances therein mentioned, or, rather, that the delivery of the bill by the drawer to the payee, such bill still remaining in his hands or outstanding, would furnish a defence to the action according to the case of *Kearslake* v. *Morgan* (*a*), because, if the drawer could be compelled to pay the original debt under circumstances furnishing a right of action against his drawee and thereby taking *his* funds out of the hands of the drawee, he might, in the result, be found to pay the amount twice; directly by himself, and indirectly through the medium of his drawee. I shall be understood, my Lords, to speak of a case wherein the holder has consented to take the qualified acceptance. I have clearly intimated, that, in my opinion, he may refuse to do so; and, if he does refuse, he may, in my opinion, treat the bill as dishonoured, and sue the drawer upon it.

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(IN THE HOUSE OF LORDS.)

Opinions given by the Judges, in Answer to certain Questions of Evidence put to them by the Lords in the Course of the Proceedings against the QUEEN, and confirmed by the House.

August 24.

If a witness, without objecting to it, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding upon his conscience; but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and such question cannot be asked.

THE following question was proposed to the learned Judges by the House, and delivered to the Lord Chief Justice *Abbott*:

If a witness produced in the courts below, without objecting to it, takes the oath according to the usual form, can he be asked whether he considers the oath he has taken, as binding upon his conscience, and can he be, also, asked, whether there are other modes of swearing more binding upon his conscience than the oath he has taken?

The Judges, after having retired for some time, returned the following answer, which was thus delivered by

ABBOTT C. J. My Lords, the Judges have considered the question proposed to them by your Lordships, and they have taken the liberty to detain your Lordships while they sent for books, in order that they might consult the authorities referred to in the course of the argument before your Lordships. My Lords, the Judges are of opinion, that the most correct and proper time for asking a witness whether the form in which the oath, as about to be administered to him, is one that will be binding upon his conscience, is before that oath is administered; but, inasmuch as it may occasionally

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ally happen, that the oath will be administered in the usual form by the officer of the Court, before the attention of the Court, or party, or counsel is directed to it, we think, that the party ought not to be precluded; and, therefore, my Lords, in answer to your Lordships' first question, the Judges are of opinion, that, although the witness produced in a court of law shall have taken the oath in the usual form as therein administered, without making any objection to it, he may, nevertheless, be, afterwards, asked, whether he considers the oath he has taken as binding upon his conscience. I am, further, to inform your Lordships, that the Judges are of opinion, that, if the witness, in answer to that question, shall declare in the affirmative, namely, that he does consider the oath which he has taken as binding upon his conscience, he cannot, then, be further asked, whether there be any other mode of swearing that would be more binding upon his conscience than that which has been used. Speaking for myself, not meaning, thereby, to pledge the other Judges, though I believe their sentiments concur with my own, your Lordships will allow me to speak in my own person. I conceive, that, if a witness says he considers the oath as binding upon his conscience, he does, in effect, affirm, that, in taking that oath, he has called his God to witness, that what he shall say will be the truth, and that he has imprecated the Divine vengeance upon his head, if what he shall afterward say is false; and, having done that, that it is perfectly unnecessary and irrelevant to ask any further questions.

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Sept. 1.

1. It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and having asked him whether he wrote that letter.

2. Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited.

3. But, if the witness deny that he wrote such part, he cannot be examined as to the contents of the letter.

The following questions were proposed to the learned Judges, and delivered to the Lord Chief Justice:

First, whether, in the courts below, a party, on cross-examination, would be allowed to represent, in the statement of a question, the contents of a letter, and to ask the witness, whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness, whether the witness wrote that letter, and his admitting that he wrote such letter?

Secondly, whether, when a letter is produced in the courts below, the Court would allow a witness to be asked, upon shewing the witness only a part of, or one or more lines of such letter and not the whole of it, whether he wrote such part or such one or more lines; and, in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?

The Judges, after having retired for a short time, returned the following answer:

ABBOTT C. J. My Lords, the Judges have conferred upon the questions propounded to them by your Lordships, the first question was in these words. (Here the Lord Chief Justice recited the first question.)

The Judges are of opinion, that that question must be answered by them in the negative; and the reason and foundation of our opinion is shortly this. The contents of every written paper, are, according to the ordinary and well established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence; the proper course, therefore, my Lords, is to ask the witness, whether or no that letter is of the

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hand-writing of the witness? If the witness admits that it is of his or her hand-writing, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then, my Lords, the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the Court may be possessed of the whole. If the course, which is here proposed, should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper; and thus the Court may never be in possession of the whole, though it may happen, that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part.

My Lords, the next question proposed by your Lordships, is, (here the second question was stated.) The Judges beg your Lordships' permission to divide this question into two parts. In answer to the first part, namely, " Whether, when a letter is produced in the courts below, the Court would allow a witness to be asked, upon showing the witness only a part or one or more lines of such letter, and nót the whole of it, whether he wrote such part?" The Judges are of opinion, that that question should be answered by them in the affirmative in that form; but, in answer to the latter part, which is this, " And in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter?" the learned Judges answer in the negative, for the reason I have already given, namely, that the paper itself is to be produced, in order that the whole may be seen, and the one part explained by the other.

The counsel were called in and informed, that, upon cross-examination, counsel cannot be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote

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a letter to any person with such contents, or contents to the like effect, unless the letter is first shown to the witness, and the witness is asked whether he wrote such letter, and admits that he did write it; and also, that the House will allow a witness to be asked, upon cross-examination, upon shewing such witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part, or such one or more lines. But, if the witness should not admit that he wrote such part, or such one or more lines, the witness cannot be examined to the effect of the contents of the letter, unless it is shown to him, and he admits that he wrote it.

Same Day.

If, on cross-examination, a witness admits a letter to be of his hand-writing, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence.

2. In the ordinary course of proceeding, such letter must be read as part of the cross-examining counsel's case. The Court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof.

The following question was proposed to the Judges: 'Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the Court below to be read?

The Judges, after having retired for a short time, returned the following answer:

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ABBOTT C. J. My Lords, the Judges have conferred upon the questions last proposed to them by your Lordships: the first part of your Lordships' question is in these words: "Whether, when a witness is cross-examined, and, upon the production of a letter to the witness under cross-examination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; or whether the letter itself must be read as the evidence, to manifest, that such statements are or are not contained in the letter?" My Lords, in answer to this part of your Lordships' question, I am to inform your Lordships, that the Judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, enquire whether or no such statements are contained in the letter; but, that the letter itself must be read to manifest whether such statements are or are not contained in that letter. My Lords, in delivering this opinion to your Lordships, the Judges do not conceive that they are presuming to offer to your Lordships any new rule of evidence, now, for the first time, introduced by them; but, that they found their opinion upon what, in their judgment, is a rule of evidence as old as any part of the common law of *England*, namely, that the contents of a written instrument, if it be in existence, are to be proved by that instrument itself, and not by parol evidence. The latter part of your Lordships' question is, "In what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read or be permitted by the court below to be read?" My Lords, in answer to this, I am to inform your Lordships, that the Judges are of opinion, according to the ordinary rule of proceeding

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in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn, after he shall have opened his case; that that is the ordinary course; but that, if the counsel, who is cross-examining, suggests to the Court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the Court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, *that* becomes an excepted case in the courts below, and, for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence.

The counsel were called in, and were informed, that when a witness is cross-examined, and upon the production of a letter to the witness under cross-examination, the witness admits he wrote that letter, the witness cannot be examined, whether he did or did not, in such letter, make statements such as the counsel shall, by questions addressed to the witness, enquire are or are not made therein; but that the letter itself must be read as the evidence, to manifest that such statements are or are not contained therein; and, further, that it is the opinion of the House, that, in the regular course of proceeding, the letter ought to be read after the counsel cross-examining shall have opened his case; but that the House will, upon the request of such counsel, stating that it is expedient for the purpose of his more effectually, in the course of his cross-examination, propounding further questions necessary for the interest of his client, permit such letter to be read, subject to all the

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consequences of having such letter considered as part of his evidence. 1820.

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The *Lord Chancellor*, by leave of the House, stated, in their presence, that a reference having been made by the learned counsel for her Majesty, at the close of yesterday's proceedings, to the trial of the Duchess of *Kingston*, where it was stated that a letter had been presented to a witness (*Judith Phillips*) on cross-examination, and having been acknowledged by her to be her hand-writing, had been afterwards read in evidence, *not* as part of the Defendant's case. His Lordship had since referred to the printed trial, and had compared the statement contained in that with the journals of their Lordships' House; and his Lordship read at length the proceedings, touching the same, both as they appeared in the printed trial and upon the journals of the House: after which the counsel were informed, that, in the opinion of the House, the proceedings touching the said letter, as set forth in the printed trial, did not appear to establish, or destroy, or affect the opinion delivered by the learned Judges to the House yesterday; and that, according to the proceedings as they appeared upon the journals of the House, there was no statement whatever, there, to show that the letter was ever read; therefore, the House was of opinion, in the present case, to adhere to the rule as laid down yesterday. *Sept.* 2.

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Sept. 5.

If, on cross-examination, it is proposed to ascertain of a witness whether he has made representations of any particular nature, immediately after being asked whether he made any representation he must be asked whether he made the representation by parol or in writing.

The following question was proposed to the Judges: Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?

The Judges, after having retired for a short time, returned the following answer:

ABBOTT C. J. My Lords, the Judges have conferred upon the question proposed to them by your Lordships. My Lords, the Judges find a difficulty to give a distinct answer to the question thus proposed by your Lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your Lordships as distinctly referring to such a question propounded by counsel on cross-examination, as is here contained; that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, "whether a witness has made such and such representation," has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at *nisi prius*, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is often asked, whether there is an agreement for a certain price for a certain article, — an agreement for a certain definite time, — a warranty, — or other matter of that kind, being a matter of contract; and, when a question

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of that kind has been asked at *nisi prius*, the ordinary course has been for the counsel on the other side, not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question; namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side, was or was not in writing; and, if the witness answers that it was in writing, then the enquiry is stopped, because the writing must be itself produced. — My Lords, therefore, although we cannot answer your Lordships' question distinctly in the affirmative or the negative, for the reason I have given, namely, the want of an established practice referring to such a question by counsel; yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing, (the proper course being to put the writing into his hands, and ask him whether it be his writing,) considering the question proposed to us by your Lordships, with reference to that principle of law which requires the writing itself to be produced, and with reference to the course that ordinarily takes place on questions relating to contracts or agreements, we, each of us, think, that if such a question were propounded before us at *nisi prius*, and objected to, we should direct the counsel to separate the question into its parts. — My Lords, I find I have not expressed myself with the clearness I had wished, as to dividing the question into parts. I beg, therefore, to inform the House, that, by dividing the question into parts, I mean, that the counsel would be directed to ask whether the representation had been made in writing or by words. If he should ask, whether it had been made in writing, the counsel on the other side would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, the

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the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it.

The counsel were called in, and were informed, that if, on cross-examination, they enquired of a witness whether he had made representations of any particular nature, stating the nature of those representations, they must, in their enquiries, ask the witness, first, "whether he made the representations by parol or in writing."

The Attorney-General of the Queen enquired, whether he was to understand, before he had asked whether the witness made any representations, he was to ask whether it was in writing.

The counsel was informed that he might put the question, referring, in the mode of putting it, to a representation by parol; or, that where a question of that kind was put, the counsel on the other side was justified by the practice in breaking in upon the course of the cross-examination so far as to put the question, whether the declaration, if made, was by parol or in writing.

Sept. 6.

If, on the trial of an action or indictment, a witness examined on the part of the Plaintiff or prosecutor, upon cross-examination by Defendant's counsel, states that at a time specified he told *A.* that he was one of the witnesses against the Defendant, and being re-examined by the Plaintiff's or prosecutor's counsel, states what induced him to mention this to *A.*, the Plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses: by eight Judges against one, (*Best* J. *dissentiente*,) and confirmed by the House.

The following questions were proposed to the judges:

First, If, upon the trial of an action brought by *A.* (Plaintiff) against *B.* (Defendant), a witness examined on the part of the Plaintiff, upon cross-examination by the

the Defendant's counsel, had stated, in answer to a question addressed to him by such counsel, that, at a time specified in his answer, he had told a person named *C. D.* that he was one of the witnesses against the Defendant, and being re-examined by the Plaintiff's counsel, had stated what induced him to mention to *C. D.* what he had so told him, and the counsel of the Plaintiff should propose further to re-examine him as to the conversation between him and *C. D.* which passed at the time specified in his former answer, as far only as such conversation related to his being one of the witnesses; would such counsel, according to the rules and practice observed in the courts below, with respect to cross-examination and re-examination, be entitled so further to re-examine such witness; and, if so, would he be entitled so further to re-examine, as well with respect to such conversation relating to his being one of the witnesses against *B.* as passed between him and *C. D.* at the time specified after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he had so told him?

Second, If, upon the trial of an indictment against *A.*, a witness examined upon the part of the crown had stated upon cross-examination by the counsel of *A.*, in answer to a question addressed to him by such counsel, that, at a time specified in his answer, he had told a person named *C. D.* that he was one of the witnesses against *A.*, and being re-examined by the counsel for the crown, had stated what induced him to mention to *C. D.* what he had so told him, and the counsel for the crown should propose further to re-examine him as to the conversation which passed between him and *C. D.* at the time specified in his former answer, as far only as such conversation related to his being one of the witnesses, would such counsel be entitled so further to re-examine him; and, if so, would he be entitled so

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further to re-examine as well with respect to such conversation, relating to his being one of the witnesses against *A.*, which passed between him and *C. D.* at the time specified after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he had so told him?

The Judges having retired, returned, after some time, when, the House being informed that the Judges differed in their opinion as to the answer to be given to the questions proposed to them, they proceeded to deliver their opinions *seriatim*.

RICHARDSON J. delivered his opinion upon both questions in the negative, and referred to the reasons to be delivered by the Lord Chief Justice of the King's Bench.

BEST J. delivered his opinion upon both questions in the affirmative, and gave his reasons.

GARROW B. BURROUGH J. HOLROYD J. GRAHAM B. RICHARDS C. B. and DALLAS C. J. severally delivered their opinion on both questions in the negative, and referred to the reasons to be delivered by the Lord Chief Justice of the King's Bench. Then the Lord Chief Justice of the King's Bench delivered his opinion upon both questions in the negative, and gave his reasons, in which he stated he was desired by the other Judges, except Mr. Justice *Best*, to say that they concurred.

ABBOTT C. J. My Lords, I agree with the other Judges in considering the two questions proposed to us by your Lordships to be, with reference to the point on which our opinion has been asked, substantially one, and

and that question, as proposed by the House, contains these words, "the witness being re-examined, had stated what induced him to mention to *C. D.* what he had so told him;" by which, I understand, that the witness had fully explained his whole motive and inducement to inform *C. D.* that he was to be one of the witnesses; and, so understanding the matter, and there being no ambiguity in the words, "I am to be one of the witnesses," I think there is no distinction to be made between the previous and subsequent parts of the conversation, and I think myself bound to answer your Lordships' question in the negative.

I think the counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions; but, I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. And, as many things may pass in one and the same conversation relating to the subject of the conversation, (as, in the case put by your Lordships, the declaration of a witness that he was to be a witness in a cause or prosecution,) which do not relate to his motive or to the meaning of his expressions, I think, the counsel is not entitled to re-examine to the conversation to the extent to which such conversation may relate to his being one of the witnesses, which is the point proposed in your Lordships' question to the Judges.

And I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject

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subject matter of the suit, are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but, even matter not properly connected with the part introduced upon the previous examination, provided only, that it relate to the subject matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party, at the same time, the benefit of the entire residue of what he said on the same occasion. But the conversation of a witness with a *third* person is not in itself evidence in the suit against any party to the suit. It becomes evidence only as it may effect the character and credit of the witness, which may be affected by his antecedent declarations, and by the motive, under which he made them; but, when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent. On these grounds I feel called upon to answer your Lordships' question in the negative.

The counsel were called in, and were informed by the Lord Chancellor, that the question which gave rise to the above discussion could not be put.

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October 7.

The following questions were proposed by their Lordships to the learned Judges, and were delivered to the Lord Chief Justice.

First, If, in the courts below, a witness, examined in chief on the part of the Plaintiff, being asked whether he remembered a quarrel taking place between *A.* and *B.*, answered, that he heard of a quarrel between them, but he did not know the cause of it; and such witness was not asked, upon his cross-examination, whether he had or had not made a declaration stated in the question touching the cause of it; and, in the progress of the defence, the counsel for the Defendant proposed to examine a witness to prove that the other witness had made such a declaration to him touching the cause of such quarrel, in order to prove his knowledge of the cause of the quarrel: according to the practice of the courts below, would such proof be received?

Secondly, If, in the courts below, a witness, examined in chief on the part of the Plaintiff, being asked whether he remembered a quarrel taking place between *A.* and *B.*, answered, that he did not remember it; and such witness was not asked, on his cross-examination, whether he had or had not made a declaration stated in the question respecting such quarrel; and, in the progress of the defence, the counsel for the Defendant proposed to examine a witness to prove, that the other witness had made such a declaration, in order

1. If a witness examined in chief on the part of the Plaintiff, being asked whether he remembers a quarrel taking place between *A.* and *B.*, answers, that he has heard of a quarrel between them, but does not know the cause of it, and such witness is not asked, upon his cross-examination, whether he has or has not made a declaration stated in the question touching the cause of the quarrel, the counsel for the Defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel.

2. If a witness examined in chief on the part of the Plaintiff, being asked whether he remembers a quarrel taking place between *A.* and *B.*, answers, that he does not remember it, and such witness is not asked, on his cross examination, whether he has or has not made a declaration stated in the question respecting such quarrel, the counsel for the Defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration.

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to prove that he must remember it: according to the practice of the courts below, would such proof be received?

The Judges desired leave to withdraw, which they did; on their return,

ABBOTT C. J. delivered the following answer to the House. My Lords, the Judges have considered the questions proposed to them by your Lordships. One of those questions is in these words. (Here the Lord Chief Justice read the first question.) The Judges are of opinion, my Lords, that this question must be answered by them in the negative. The question proposed to the witness, upon his cross-examination, is, do you remember? That question applies itself to the time of the examination; and many things may have taken place, and conversation may have been held upon them at one season by persons of the strictest honour and integrity, which may, at another season, be absent from their memory. It must be in the knowledge and experience of every man, that a slight hint or suggestion of some particular matter connected with a subject, puts the faculties of the mind in motion, and raises up in the memory a long train of ideas connected with that subject; which, until that hint or suggestion was given, were wholly absent from it. For this reason, the proof, that, at a time past, a witness has spoken on any subject, does not, in our opinion, lead to a legitimate conclusion that such witness, at the time of his examination, had that subject present in his memory; and, to allow the proof of his former conversation to be adduced without first interrogating him to that conversation, and reminding him of it, would, in many cases, have an unfair effect upon him and upon his credit, and would deprive him of that reasonable protection, which it is, in my opinion, the duty of every Court to afford to every person who appears

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pears as a witness on the one side and on the other. According, therefore, to the practice of the courts below, a witness is asked, on cross-examination, whether he has made a declaration or held a conversation; and, such previous question is considered as a necessary foundation for the contradictory evidence of the declaration or conversation to be adduced on the other side. I must, however, my Lords, take the liberty to add, that, in any grave or serious case, if the counsel had, on his cross-examination, omitted to lay the necessary foundation in the way in which I have mentioned, the Court would, of its own authority, call back the witness, in order to give the counsel an opportunity of laying the required foundation, by putting his questions to the witness, although the counsel had not before asked them: it being much better to permit the order and regularity of the proceedings as to time and season to be broke in upon, than to allow irrelevant or incompetent evidence to be received.

My Lords, this being the opinion of the Judges upon the question, which I have taken the liberty to read to the House, it will follow as a consequence, your Lordships will be aware, that to the other question, which applies itself to the witness's knowledge of a particular fact, the same answer in the negative must be given; and, in addition to the reasons with which I have troubled your Lordships on the first question, it may also be added, where the question proposed regards the witness's knowledge, that, although a witness may have mentioned a fact in ordinary conversation at a former period, it does not follow, that he may have that which, in a court of law, can be considered as knowledge of the fact. A fact is often mentioned in conversation from the representation of others, without such a knowledge of it as can enable a person to say in a court of law, I know the fact.

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1. If, on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that *A. B.* (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine *C. D.* as a witness to prove, that *A. B.* has offered a bribe to *E F.* in order to induce him to give testimony touching the matter in the indictment, (*E. F.* not being a witness examined in support of the indictment, nor examined before it was so proposed to examine *C. D.*)

2. If, in the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that *A. B.* (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine *G. H.* as a witness to prove that *A. B.* has offered him a bribe, to induce him to bring to *A. B.* papers belonging to the party indicted, (*G. H.* not having been examined as a witness in support of the indictment.)

3. On a prosecution for a crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial, so that the conspiracy is to be given in evidence against him, — general evidence of the existence of the conspiracy charged, may be received in the first instance, though it cannot affect such Defendant, unless brought home to him or to an agent employed by him.

4. The same rule applies, if a Defendant seeks by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence, provided the proposed evidence be previously opened to the Court, as in the case of a prosecution to be proved by conspiracy.

The following questions were proposed to the learned Judges.

First, If, in the trial of an indictment for a capital offence, or any crime, evidence had been given, upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared, *A. B.*, not examined as a witness, had been employed, by the party preferring the indictment, as an agent to procure and examine evidence and witnesses in support of the indictment, and the party indicted should propose, in the course of the defence, to examine *C. D.* as a witness to prove, that *A. B.* had offered a bribe to *E. F.*, in order to induce him to give testimony touching the matter in the indictment (*E. F.* not being a witness examined in support of the indictment, or examined before it was so proposed to examine *C. D.*): would the courts below, according to their usage and practice, allow *C. D.* to be

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examined for the purpose aforesaid; or could such witness, according to law be so examined, if the counsel employed in support of the prosecution objected to such examination? 1820. The QUEEN's Case.

Secondly, If, in the trial of an indictment for a capital offence or other crime, evidence had been given, upon the cross-examination of witnesses examined in chief in support thereof, from which it appeared, that *A. B.*, not examined as a witness, had been employed by the party preferring the indictment as an agent to procure and to examine evidence and witnessess in support of the indictment, and the party indicted should propose, in the course of the defence, to examine *G. H.* as a witness, to prove, that *A. B.* had offered him a bribe to induce him to bring to him papers belonging to the party indicted, (*G. H.* not having been examined as a witness in support of the indictment): would the courts below, according to their usage and practice, allow *G. H.* to be examined for the purpose aforesaid; or could such witness, according to law, be so examined, if the counsel employed in support of the prosecution objected to such examination?

The learned Judges desired leave to withdraw, which they did; and on their return, prayed for leave for further time to consider on these questions till the next day; leave was granted accordingly; and a third question was proposed to them, which, on the next day, was withdrawn, not being sufficiently clear; and the following question proposed in its stead.

Supposing that, according to the rules of law, evidence of a conspiracy against a Defendant for any indictable offence ought not to be admitted to convict or criminate him, unless as it may apply to himself or to an agent employed by him, may not general evidence, nevertheless, of the existence of the conspiracy charged

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upon the record, be received in the first instance; though it cannot affect such Defendant, unless brought home to him, or to an agent employed by him; and, whether the same rule would apply, if a Defendant sought by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence?

October 18.

On this day ABBOTT C. J. delivered the following answer to the House.

My Lords, the Judges conferred together for some time yesterday, upon the questions proposed to them by your Lordships, and afterwards separated, in order to consider them apart, and met again early this morning, and again conferred together upon them. All of us then agreed in the answers to be given to the questions proposed to us; and I, having read to my learned Brothers the writing, which I had prepared, as containing my own sentiments and answer, it was found, that they concurred therein; and I have their authority, with your Lordships' permission, to deliver what I had written, (which your Lordships will observe is in the singular number, being originally prepared as my own alone), as containing and expressing their sentiments also.

My Lords, the first question proposed by your Lordships is in these words. (Here his Lordship repeated the first question.) My Lords, the question thus proposed by your Lordships to the Judges, must be admitted by all persons to be a question of great importance, as it regards the administration of justice; and it is to me a question entirely new, and of very difficult solution. I have considered it with all the attention due to a question proposed by your Lordships, and with an anxiety proportioned to the importance of the

the question itself; and it is not without much diffidence, that I now offer to your Lordships the result of my deliberation. Your Lordships will allow me here to interpose an observation, and to say, that the diffidence I felt at the moment of writing, has been considerably decreased by the knowledge I now have, that my opinion and sentiments have received the concurrence of my learned Brothers.

The question must, as it appears to me, be considered in the same mode, and must receive the same answer, as if the parties were reversed: as if, instead of proof offered on the behalf of a Defendant respecting the act of an agent employed by the prosecutor, it were proof offered in reply on the part of the prosecutor respecting the conduct of an agent employed by the accused to procure and examine evidence and witnesses in support of his defence. If such proof can be received on the part of a Defendant, it must be received on the ground, that it may lead to a legitimate inference and conclusion, that the witnesses examined against him, although not appearing to have been called before the Court by any undue means, are, nevertheless, on this ground extraneous and foreign to them,' not to be considered as the witnesses of truth. And, if such an inference and conclusion can be reasonably and legitimately drawn in favour of a Defendant, in the case proposed by your Lordships, I am unable to discover any principle, upon which I may say, that the like conclusion may not be with equal reason drawn against him in the analogous case that I have taken the liberty to suggest; so that proof of this nature, if admissible, must be expected to lead as frequently to the condemnation of an innocent man by casting discredit upon his defence, as to the acquittal of such a person by disgracing the prosecution: and this consideration enables me to contemplate the question proposed with more calmness than I

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should be able to view a question, of which the determination might possibly, by the exclusion of his evidence, lead to the condemnation of an innocent person; but could, in no case, produce the same consequence by the exclusion of evidence against him.

The question proposed by your Lordships regards the act of "A person employed by the party preferring an indictment as an agent to procure and examine evidence and witnesses in support of the indictment;" and it regards the act of that agent addressed to a person not examined as a witness in support of the indictment, the offered proof not apparently connecting itself with any particular matter deposed by the witnesses, who have been examined in support of the indictment, and leaving, therefore, those witnesses unaffected by the proposed proof, otherwise than by way of inference and conclusion; and this question may be considered as it regards the prosecutor or party preferring the indictment, and as it regards the witnesses.

The prosecutor has, by the hypothesis, employed a person as an agent to procure and examine evidence and witnesses. This is a lawful employment necessary in many cases; in some meritorious, in none disgraceful or improper, if we look either to the employer or to the person employed; and, being a lawful employment, it is to be presumed, until the contrary be shown, that the employer means and intends, that his agent shall execute it by lawful means: and as, according to the general rules and principles of law, a person is not to be affected in interest or fame by any act of another, although that other may have been in his employment or confidence as an agent or otherwise, (excepting such acts only as either are in their own nature, or may, by extrinsic evidence, be shown to be within the scope of the authority given by him, and which may, therefore, be considered as his acts performed by the hand, or his declar-

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declarations uttered by the tongue of his appointed substitute) it would be contrary to those general rules and principles to allow a prosecutor, and, through him, the prosecution that he has instituted, to be disgraced by the act supposed in your Lordships' question, without some further proof affecting him than the terms of that question suggest. It is perfectly consistent with the matters of fact contained in your Lordships' question, that the prosecutor may, up to the very moment when the proof is offered, be wholly ignorant of the wicked act of his agent; it is no less consistent, that, having been informed of the act, he may have rejected it with indignation, and have repudiated the proffered testimony, and withholden the witness from the Court; and, if he be absent from the trial, which frequently happens, it may be impossible to prove his ignorance in the one case, or the propriety of his conduct on the other.

With regard to the witnesses, my Lords, which is the most important part of this consideration (because, if false witnesses are produced against a person, it is of little consequence to him by what particular procurement they may have been produced), it is to be considered, whether a legitimate inference and conclusion can be drawn against their credit and veracity from the proof proposed. The proposed proof does not directly affect them; it regards an act, to which, according to the hypothesis, they may be entire strangers; and, being an unlawful act, they are not to be presumed to have been parties to it, or to any other act of the like nature without proof against them; they may be persons of honour and probity deposing to facts really and truly occurring within their own personal knowledge, and taking place within their own sight or hearing as they have averred upon their oath. It may have been intended, that the person, to whom the bribe was offered, should speak to other facts occurring at another time and

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and in another place wholly unconnected with them or with the matters to which they have deposed: can it then be reasonably concluded, that the facts deposed by them are untrue; that, however respectable or numerous they may be, they must be all wicked and perjured men, because some other man has, from overweening zeal or a corrupt heart, wickedly endeavoured to seduce by money another person to give evidence touching the matter of that indictment, on which they have appeared? I must say, my Lords, that I am of opinion, that such conclusion cannot reasonably be drawn, either in the case proposed in your Lordships' question, or in that analogous case which I have taken the liberty to adduce. The utmost effect, in my opinion, of the proposed proof (and, in many cases, even this would not be a fair or reasonable effect,) would be to excite suspicion; but suspicion is not a legitimate ground for the verdict of a jury, which ought only to be founded upon reasonable and probable proof. For these reasons, I think your Lordships' first question must be answered in the negative.

This, my Lords, is the opinion, which after much consideration I have formed upon the question proposed by the House. That question is couched in the most general and abstract terms, and your Lordships must be aware of the difficulty that may often occur, in forming an opinion upon a question of such a nature, applied not to a matter of abstract science, but to a matter connected with the business and affairs of men. Few cases occur in the practical administration of justice, wherein a Judge does not find some help toward a right decision of a questionable point in antecedent or accompanying facts and circumstances appearing before him, and is not guided in his application of general principles to the individual case by the particulars of that case itself. The question, as proposed by your

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Lordships, does not contain any such aid or guide; I mention not this, my Lords, by way of complaint against the question, but by way of excuse for the imperfection of my answer to it; and, I must beg leave to add, that notwithstanding the opinion I have delivered on the question proposed, I am by no means prepared to say, that, in no case and under no circumstances appearing at a trial, it might not be fit and proper for a Judge to allow proof of this nature to be submitted to the consideration of a jury: and the inclination of every Judge is to admit rather than to exclude the offered proof.

Secondly. The same reasons which have induced me to answer your Lordships' first question in the negative, lead me to answer the second question also in the negative. The question is in these words: (the Lord Chief Justice here read the second question.)

In answer to this question, my Lords, I must also take leave to add, as another ground of objection to the proof proposed in the question, that it does not thereby appear what was the nature of the papers alluded to, or what the motive of the party endeavouring to obtain them: for any thing that can be inferred from that question, the papers might be unconnected with the subject of the prosecution, and relate wholly to some other and different matter.

Then ABBOTT C. J. delivered the unanimous opinion of the learned Judges to the first part of the third question in the affirmative, and to the latter part of the same in the affirmative also, with a qualification, and gave their reasons as follow;

My Lords, we understand the first part of this third question to relate to a prosecution for some crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial; so that the conspiracy is

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to be given in evidence against him; and the latter part of the question regards the case of a person indicted for some crime, and seeking to defend himself against that indictment, by proving a conspiracy to suborn witnesses against him; and the points of enquiry in both parts regard only the order and course of adducing the proof before the Court; and, so understanding this question, we have no hesitation as to answering the first part of it in the affirmative. We are of opinion, that on a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance be received, as a preliminary step to that more particular evidence, by which it is to be shown that the individual Defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to shew the true meaning and character of the acts of the individual defendants; and, on that account, we presume it is permitted. But, it is to be observed, that, in such cases, the general nature of the whole evidence intended to be adduced is previously opened to the Court, whereby the Judge is enabled to form an opinion as to the probability of affecting the individual Defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if, upon such opening, it should appear manifest, that no particular proof sufficient to affect the Defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time.

As to the second part of the question, my Lords, we understand it to be here assumed, that the supposed conspiracy to suborn witnesses against the accused is a

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legitimate ground of defence, and that your Lordships do not ask the opinion of the Judges upon that point; and, therefore, upon that point, we do not presume to offer any thing to your Lordships; and, considering this latter part of the proposed question, like the first part, to regard only the order and course of adducing the proof, we should give the same answer in the affirmative, with this qualification only, namely, that the proposed evidence should, in some way, be previously opened to the Court, as in the case of a prosecution to be proved by conspiracy, in order to enable the Judge to form an opinion as to the probability of bringing the evidence home so as to affect some person whose acts are material and relevant to the issue in the indictment then under trial.

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October 19.

The following questions were proposed to the learned Judges.

First. Whether, according to the practice and usage of the courts below, and according to law, when a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution; it would be competent to the party accused, to examine witnesses in his defence, to prove such

1. When a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnesses in his defence to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts.

2. If a witness is called on the part of a Plaintiff or prosecutor, and gives evidence against the Defendant or accused; and if, after the cross-examination of such witness, the Defendant's or accused's counsel discover that the witness so examined has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause, the counsel for the Defendant or accused are not permitted to give evidence of such corrupt act of such witness, without calling back such witness.

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such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts?

Second. Whether, if, on any trial in any court below, a witness is called on the part of the Plaintiff or Prosecutor, and gives evidence against the Defendant in such cause; and if, after the cross-examination of such witness by the Defendant's counsel, they discover, that the witness so examined has corrupted or endeavoured to corrupt another person to give false testimony on such cause, the counsel for such Defendant may not be permitted to give evidence of such corrupt act of such witness, without calling back such witness?

The question being delivered to *Abbott* C. J., and the learned Judges having requested leave to withdraw to consider the same, leave was accordingly given till the next morning, when

October 20. The Lord Chief Justice of the King's Bench delivered the unanimous opinion and answer of the learned Judges to both the questions propounded to them, severally, in the negative, and gave their reasons.

ABBOTT C. J. My Lords, the learned Judges have considered the questions proposed to them by your Lordships. (Here the Lord Chief Justice repeated the questions.) My Lords, the only material distinction between the two questions appears to be this: *viz.* that, in the latter of the two, the supposed misconduct of the witness is assumed to have been discovered after his cross-examination. In the courts below, wherein causes usually begin and end at one sitting, subsequent discoveries rarely occur in the progress of a trial, the parties on each side are expected to come at the commencement duly prepared with all the proof that may be relevant to the matter in issue, and with nothing more; and we think

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the only effect of a subsequent discovery, would be to allow the witness to be called back for further cross-examination, if still within reach, which may be done upon that or other reasonable ground. And we are of opinion, that, according to the usage and practice of the courts below, and, according to law as administered in those courts, the proposed proof cannot be adduced without a previous cross-examination of the witness as to the matter thereof.

The legitimate object of the proposed proof is to discredit the witness. Now the usual practice of the courts below, and a practice, to which we are not aware of any exception, is this; if it be intended to bring the credit of a witness into question by proof of any thing that he may have said or declared, touching the cause, the witness is first asked, upon cross-examination, whether or no he has said or declared, that which is intended to be proved. If the witness admits the words or declarations imputed to him, the proof on the other side becomes unnecessary; and the witness has an opportunity of giving such reason, explanation, or exculpation of his conduct, if any there may be, as the particular circumstances of the transaction may happen to furnish; and thus the whole matter is brought before the court at once, which, in our opinion, is the most convenient course. If the witness denies the words or declaration imputed to him, the adverse party has an opportunity, afterwards, of contending, that the matter of the speech or declaration is such, that he is not to be bound by the answer of the witness, but may contradict and falsify it; and, if it be found to be such, his proof in contradiction will be received at the proper season. If the witness declines to give any answer to the question proposed to him, by reason of the tendency thereof to criminate himself, and the Court is of opinion that he cannot

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cannot be compelled to answer, the adverse party has, in this instance, also, his subsequent opportunity of tendering his proof of the matter, which is received, if by law it ought to be received. But the possibility, that the witness may decline to answer the question, affords no sufficient reason for not giving him the opportunity of answering, and of offering such explanatory or exculpatory matter as I have before alluded to: and it is, in our opinion, of great importance that this opportunity should be thus afforded, not only for the purpose already mentioned, but, because, if not given in the first instance, it may be wholly lost; for a witness, who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the Court, and may not be found or brought back until the trial be at an end. So that, if evidence of this sort could be adduced on the sudden and by surprise, without any previous intimation to the witness or to the party producing him, great injustice might be done; and, in our opinion, not unfrequently would be done both to the witness and to the party; and this not only in the case of a witness called by a Plaintiff or prosecutor, but equally so in the case of a witness called by a Defendant; and one of the great objects of the course of proceeding established in our Courts is the prevention of surprise, as far as practicable, upon any person who may appear therein.

The questions proposed by your Lordships comprise not only declarations made by a witness; but, also, in the language of the first of those questions, "Acts done by him to procure persons corruptly to give evidence in support of the prosecution;" and in the language of the latter question, "a discovery that the witness has corrupted or endeavoured to corrupt another person to give false testimony in such cause."

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My Lords, we understand the acts thus mentioned to be acts occurring in the ordinary mode and usual course wherein such transactions are proved in common experience to take place, because we presume, if the questions had related to an act done in an extraordinary and unusual manner, our attention would have been directed to the special mode and circumstances of the act, by the frame and language of the questions. Now, such acts of corruption are ordinarily accomplished by words and speeches: an offer of money or other benefit derives its entire character from the purpose for which it is made, and this purpose is notified and explained by words; so that an enquiry into the act of corruption will usually be, both in form and effect, an enquiry as to the words spoken by the supposed corruptor; and words spoken for such a purpose do, in our opinion, fall within the same rule and principle, with regard to the course of proceeding in our courts, as words spoken for any other purpose; and we do not, therefore, perceive any solid distinction with regard to this point between the declarations and the acts mentioned in the questions proposed to us. It will be obvious, that the observations regarding convenience and inconvenience, which we have taken the liberty to offer to your Lordships as to the proof of words, are alike applicable to the proof of acts. Nice and subtle distinctions are avoided in our courts as much as possible, especially in matters of practice, on account of the delay, confusion, and uncertainty, to which such distinctions naturally lead. For these reasons, my Lords, we have thought ourselves called upon to answer both questions wholly in the negative.

END OF CASES IN TRINITY TERM AND VACATION.

CASES

ARGUED AND DETERMINED IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Michaelmas Term

In the First Year of the Reign of GEORGE IV.

1820.

DAVENPORT and SMITH, Assignees of HAWKINS, a Bankrupt, v. CARTER and CURRY.

Nov. 7.

In *November*, 1818, a commission of bankruptcy was issued against *M.* and Co., under which the Defendants were appointed assignees. *H.*, being indebted to *M.* and Co., had deposited with the Defendants, as assignees of *M.* and Co., a promissory note; and, in *January*, 1819, paid this debt to the Defendants as such assignees, who then delivered the note back to him. *H.* had, unknown to any of the parties, in *May*, 1818, committed an act of bankruptcy; and in *May*, 1819, a commission issued against him. In *August*, 1819, the commission against *M.* and Co. was superseded; and, in *September*, 1819, a new commission issued against them, under which the Defendants were again chosen assignees. Between the superseding of the first commission against *M.* and Co. and the re-appointment of the Defendants as assignees under the second, the Plaintiffs, as assignees of *H.*, demanded of the Defendants the sum which *H.* had paid to them as assignees of *M.* and Co. In an action by the Plaintiffs as assignees of *H.* against the Defendants in their own right, for the money received by them from *H.*, the jury having found a verdict for the Defendants, the Court refused to grant a new trial.

ASSUMPSIT for money had and received. At the trial before *Graham* B. (*Winchester* Summer assizes, 1820,) the following facts were proved. In *November*,

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1818, a commission of bankruptcy was issued against *Minchin* and Co. of *Gosport*, under which commission the Defendants were appointed assignees. *Hawkins*, being indebted to *Minchin* and Co. in the sum of 203*l.* 4*s.* 10*d.*, had deposited with the Defendants, as the assignees of *Minchin* and Co., a promissory note for 200*l.*; and, in *January*, 1819, he paid this debt to the Defendants as such assignees, who, at the time of such payment, delivered back to him the promissory note. In *May*, 1818, *Hawkins* had, unknown to any of the parties, committed an act of bankruptcy, and a commission was issued against him in *May*, 1819. In *August*, 1819, the commission against *Minchin* and Co. was superseded, and a new commission was issued against the persons composing the firm, in *September*, 1819, under which the Defendants were again appointed assignees. Between the superseding of the first commission against *Minchin* and Co. and the re-appointment of the Defendants as assignees under the second, the Plaintiffs, as assignees of *Hawkins*, demanded of the Defendants the sum which *Hawkins* had paid to them as assignees of *Minchin* and Co., which the Defendants refused to pay: the Defendants were sued in their own right, and not as assignees of *Minchin*, and the Plaintiffs claimed this sum on the ground, that the commission which existed at the time when *Hawkins* made his payment having been afterwards superseded, the Defendants could not be considered at that time as assignees of *Minchin* and Co., or as having any title to the sum so paid them: and, that this payment could not under the circumstances be considered a valid payment under the 46 *G.* 3. (*a*) *Graham* B. expressed his opinion that this was a case which was particularly intended to be protected by the statute, the payment being made

(*a*) c. 135. s. 1.

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more than two months before the issuing of *Hawkins*'s commission: that, at the time of the payment, the Defendants were ostensibly the assignees of *Minchin* and Co.: and that the re-delivery of the note to *Hawkins* shewed the fairness of the transaction. The jury found a verdict for the Defendant. And now,

Bosanquet Serjt. having moved to set this verdict aside and have a new trial, for the reasons urged before *Graham* B.,

The Court said that, as then advised, they saw nothing in the objections, but that they would consult together on the case: and, the next morning, *Park* J. delivered the following opinion:

My Brothers *Burrough* and *Richardson*, together with myself (*a*), have considered this case: and we are of opinion, that the verdict for the Defendants should stand. When this payment was made by *Hawkins*, it is quite clear and admitted that nobody knew or suspected, that any act of bankruptcy had been committed by *Hawkins*: and, as four months elapsed between that payment and the commission actually issuing, it is quite clear, that, in the hands of *Minchin* himself, supposing that he had remained solvent, and that the payment had been made to him, that payment never could have been disturbed by virtue of stat. 46 *G.*3. *c.* 135. *s.* 1. Then, how is the case altered by *Minchin*'s bankruptcy? I think, not at all. If the first commission had remained in force, it seems admitted, that the Plaintiffs could not recover. But the commission was superseded; and, suppose no new one had issued, then the assignees, the Defendants, would have received this money to the use of *Minchin*, when they supposed

(*a*) *Dallas* C.J. was absent when this case was moved.

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themselves entitled to receive it, and must have accounted to *Minchin* for the money. But, before they are called upon by *Minchin* to account, a new commission issues, and all the rights revest in them, which were supposed erroneously to be in them before, but which now are legally and validly so: and, therefore, we think there is no ground for this application. With respect to the promissory note, that strengthens my opinion; for, now, the assignees of *Minchin*, if made liable in this action, could never be placed in the same situation, in which they were, by again getting back the note mentioned in the motion.

Rule refused.

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The *East India* Company having hired *A.*'s ship to carry goods and 40 invalids, agreed, in concurrence with the Government at *Madras*, to increase the number to 200, provided *A.* would make certain proposed alterations in his ship, and she should be found, on the usual military survey, capable of accommodating so many. *A.* agreed to the terms proposed, commenced the projected alterations, received the greater part of the goods on board, and had shipped water for 100 invalids, when, before the alterations were completed, the provisions shipped, or the invalids embarked, the vessel was so much disabled by a gale that she could not perform her homeward voyage: Held, in an action on a policy of insurance at and from *Madras* to the United Kingdom, on freight and passage-money, that there was a sufficient contract, and a sufficient inception of the risk, to render the insurers liable for the freight, and also for the passage money of the 200 invalids.

THIS was an action on a policy of insurance, dated 26th *February*, 1819, at and from *Madras* and all parts and places in the *East Indies*, to the United Kingdom, on freight and passage money valued at 5000*l.* by the ship *Cornwall*. The declaration contained two counts on the policy. — The first alleged, that the ship being at *Madras* on the voyage insured, divers goods were loaded on board her to be carried on freight on the

said

said voyage; and, that it had been agreed between the Plaintiff and the agents of the *East India* Company, that the said agents should there load divers other goods on board the said ship to be carried on freight on the said voyage, and should put on board the said ship divers passengers to be carried on the said voyage from *Madras* to the United Kingdom, for divers large sums of money for passage-money to be, therefore, paid to the Plaintiff, and that the Plaintiff was interested in the freight and passage-money to the amount of the sum insured. — The second count alleged, generally, that the Plaintiff was interested in the freight and passage-money in the policy mentioned to the amount of the sum insured. — Both counts alleged a total loss by the perils of the seas. — The declaration likewise contained the usual money counts. — The Defendant pleaded the general issue, and paid into court a sufficient sum to cover his proportion of the freight of the goods actually on board the ship when the loss happened. At the trial before *Dallas* C. J. at the *London* sittings after *Michaelmas* term, 1819, the jury found a verdict for the Plaintiff, damages 104*l.*, being the Defendant's proportion of 3600*l.*, which they found to be due to the Plaintiff upon the whole policy, namely, 2200*l.* for the freight of goods, and 1400*l.* for the passage-money, from which the sum of 900*l.* paid into court was to be deducted, subject to the opinion of the Court upon the following case. — The Defendant subscribed the policy set out in the declaration for the sum of 200*l.* The Plaintiff was then sole owner of the ship *Cornwall*, and commanded her as master on the voyage insured. The ship was at *Madras*, bound from thence to the United Kingdom, in the beginning of *October*, 1818, and a correspondence, of which the following is the substance, passed between the Plaintiff and the agents of the *East India* Company at *Madras*. By a letter, dated *Madras*, *October* 11th,

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1818, the Plaintiff tendered to the president and board of trade the *Cornwall* (naming her burden per register), to receive any freight for *England* at 8*l.* per ton, and to carry 40 invalids at 28*l.* per man, the ship finding them with provisions according to the established regulations for victualling. By a letter, dated 12th *October*, 1818, the secretary of the board of trade informed the Plaintiff, that the board agreed to pay the freight above mentioned for such quantity of goods as they might wish to lade in the *Cornwall*; and to recommend to government, that invalids should be embarked in her for *England* at the rate above mentioned, provided there were men ready to embark, and provided the accommodation allotted for them should be approved by the military surveying officer of government. Then followed a letter, dated the 12th *October*, from the surveyor, (signed also by the deputy master attendant,) stating, that he had found the *Cornwall* a fit vessel to receive the Company's cargo, and that there was also a space allotted for 50 invalids. By a letter, dated the 13th *October*, 1818, addressed to the president and board of trade, the Plaintiff accepted the terms for tonnage stated in the letter of the 12th. By a letter, dated 19th *October*, 1818, addressed to the same parties, the Plaintiff stated, that he had offered accommodation for 86 invalids on board the *Cornwall*; but that it had occurred to him, that by giving an additional deck to the ship he should be enabled to increase the number to 200, or such number as after survey might be considered expedient, and, that he would take the additional number on terms similar to what he before proposed. By a letter, dated the same day, the deputy master attendant informed the board that he had consulted the officer by whom the ship *Cornwall* was surveyed, who had informed the deputy master that he was of opinion that the ship would accommodate the number

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of men mentioned in the Plaintiff's last letter; and added, that he (the deputy master) saw no reason why the deck should not be laid in ten or fifteen days. By a letter, dated 22d *October*, 1818, addressed to the Plaintiff, he was informed that the governor had approved of undertaking the projected alteration in the *Cornwall*, on the Plaintiff's own responsibility; an assurance from government was added, that such a proportion of invalids, &c. to the extent of 200 men, would be embarked eventually, as, on the usual survey, the ship should be found capable of receiving with convenience for the voyage to *England*, and he was requested to give two days' notice to the board, of the time when the ship would be ready for the survey. The *East India* Company's servants began loading goods on board the ship a few days after the original tender, and were employed in doing so till late in the evening of the 23d of *October*. Early in the morning of the 24th, a violent gale came on, which drove the ship from her moorings, and by which she was so much disabled, that she was rendered incapable to perform the homeward voyage. At that time, there were loaded on board her about 140 tons of goods, (she could have carried about 80 tons more, besides passengers,) water had been shipped for 100 invalids, besides the ship's company, but no invalids or passengers were on board, nor any provisions for them, other than the water. The alteration in the ship, mentioned in the Plaintiff's letter of *October* 19th, had been commenced but was not completed. The jury, being directed to find the amount of the loss separately, in respect of the freight and of the passage-money, found, that the ship could have carried goods, the freight of which would have amounted in all to 2200*l.*; and, that the ship would, besides, have carried invalids, on which a profit would have accrued to the amount of 1400*l.* The verdict was found absolutely,

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for the sum of 48*l.*, being the Defendant's proportion of the sum of 2200*l.* beyond the sum he paid into court, and, conditionally, for the sum of 56*l.*, being the Defendant's proportion of the said sum of 1400*l.* for passage-money. The money paid into court covered the freight of goods actually on board.

The questions for the opinion of the Court were, 1st, Whether, the policy being valued, the valuation could be opened? 2d, Whether the Plaintiff was entitled to recover the sum of 56*l.*, being the Defendant's proportion of the sum of 1400*l.* for the passage-money?

Blosset Serjt., for the Plaintiff, being directed by the Court to apply himself to the question respecting the passage-money, proceeded to comment on the facts of the case, and to show, that a contract existed between the Plaintiff and the *East India* Company for the conveyance of passengers, which, but for the loss of the ship by the perils of the seas, the Plaintiff might have called on the Company to fulfil; and he urged that, such a contract having existed, or an understanding tantamount to a contract, the Plaintiff was entitled to recover; the fulfilment of the contract and the gain consequent upon it having been interrupted by the perils of the seas.

Taddy Serjt. (*Vaughan* Serjt. was with him) for the Defendant. There was no contract as to passage-money; for, at the time the contract was made for the freight of goods, the ship was not in a condition to receive passengers, and the utmost that the correspondence with the *East India* Company's secretary amounts to, is, that, if the Plaintiff would make certain additions to his ship, the Company would recommend him to government for the passage of invalids. The men never were embarked,

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embarked, the ship never was prepared to receive them, and the correspondence refers only to a projected alteration. Here was no agreement for the breach of which the Plaintiff could have sued in contract or in tort. Besides this, the *East India* Company, as a corporate body, could not enter into a contract, except under seal. At all events, here was no inception of the risk. There is a wide difference between an insurance on goods, and an insurance on freight. With respect to an insurance on goods, there is an inception of risk as soon as any of them are put on board, because from that moment the ship-owner begins to earn freight; but there can be no inception of risk in an insurance on freight, unless the contract for freight be in all respects ascertained and completed. *Thompson* v. *Taylor* (*a*), *Horncastle* v. *Suart* (*b*), *Atty* v. *Lindo* (*c*), and *Davidson* v. *Willasey* (*d*), are all cases of ships chartered by instruments, under seal, for an entire voyage, consisting of different parts, of which one part at least had been performed, or of which entire voyage there had been an inception. *Tonge* v. *Watts* (*e*), *Forbes* v. *Cowie* (*f*), *Sellar* v. *M'Vicar* (*g*), and *Forbes* v. *Aspinall* (*h*), are cases in point for the Defendant; in each there was an engagement for goods to be carried home, but, as the goods were not actually on board, it was holden, there could be no recovery for freight in that respect. There is a distinction, too, between passage-money and freight; and, if the Plaintiff cannot recover for freight, still less can he recover for passage-money: the quantity of goods for which freight is to be earned, is always ascertainable before hand; here, not a single passenger had gone on board, and so far from there being any definite or completed contract, it is impossible to

(*a*) 6 *T. R.* 478.
(*b*) 7 *East*, 400.
(*c*) 1 *N. R.* 236.
(*d*) 1 *M. & S.* 313.
(*e*) 2 *Str.* 1251.
(*f*) 1 *Campb.* 520.
(*g*) 1 *N. R.* 23.
(*h*) 13 *East*, 323.

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ascertain how many invalids the Company intended to ship. No case has yet determined that a party can recover under such circumstances, unless there is a contract, by which the amount to be earned is clearly ascertained; and the doctrine hitherto laid down, ought not to be extended. [*Richardson* J. The case of *Parke* v. *Hebson*, (not yet reported,) was an action for insurance on freight; there, so far from there being any one complete or definite contract for the whole amount of the freight, the ship was what is termed a seeking ship, and was to complete its lading at a number of different places. Having part of her cargo on board, she was lost at *Jamaica*, in passing from one port to another to complete her cargo. The Plaintiff contended, that he was entitled to recover insurance on freight for that part of the intended cargo, which was not on board at the time of the loss, as well as for that which was on board, and he produced several letters from merchants and plantation-owners, respecting the intended shipments. There was no contract for any specific freight, but the party was to be paid according to the terms usual in that trade, which are well understood. The Court thought that the Plaintiff might recover under the principle of *Thompson* v. *Taylor*.] In *Parke* v. *Hebson*, the quantity of goods to be shipped appearing from the letters produced, the amount of freight was established by the usual terms of the trade; but here, as there are no means of ascertaining whether the Plaintiff would ever have completed the alteration of his ship, — no means of ascertaining what number of invalids the Company might have sent on board, — it is impossible to estimate what loss the Plaintiff might have sustained. If the ship had not perished by the perils of the sea, the passage-money might have been lost by other means; the ship might never have been fitted to receive the passengers; so that if the insurer pays, he will be held to have insured against other risks besides the

peril

perils of the seas. The unusual and indefinite nature of the Plaintiff's undertaking distinguishes his case from that of an insurance on freight, where the ship is lost in the course of an ordinary fitting out.

Blosset, in reply, denied that there was any difference in principle between freight and passage-money; both being paid as the hire of conveyance. The contract here was in part executed, and so far complete, that the Plaintiff might have sued the Company, if they had refused to perform their part of it. Then, as to the possibility of the Plaintiff losing his passage-money by such a refusal, or by other accident than those of the seas, that possibility existed in all cases of insurance whatever.

DALLAS C. J. This case appears to me to resolve itself into three points. First, whether there was any contract; secondly, if there was a contract, whether any thing was done under that contract by the assured; thirdly, does the thing done, if it was done, constitute a part execution of the contract, and an inception of the risk? As to the first point, I entertain no doubt: but, with regard to this, let us go by steps. The whole contract rests on the correspondence; and here I am at a loss to draw any distinction between an insurance on freight and an insurance on goods. The question, therefore, comes at last to this, whether there was any contract to ship goods and a certain number of passengers. As to goods, the existence of the contract is admitted, and the Plaintiff has actually recovered for the freight of them: what then is the case as to passengers? The owner offers to receive a certain number of passengers, and his offer is referred to the government; a survey of his ship is ordered, and a report made, that she is fit for the purpose in view. In consequence

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sequence of this, the owner is directed to put his ship in a proper state, and he does, at once, put himself in a train to commence his alterations; so that here is not only a proposal, but an absolute acceptance of that proposal, and calculations made on the specified number of 200 men. Clearly, then, there was such a contract as the Plaintiff asserts; and the next question is, whether any thing was done under this contract? It appears, then, that the ship was in part prepared for passengers, and that the completion of the preparations was prevented by the perils of the seas. This was clearly something done under the contract; and there can be no doubt, that on the commencement of preparations under the contract, there was also an inception of the risk. It is urged that the alterations of the ship were not completed; but they were begun, and though none of the passengers were on board, there was an inception of the voyage. The thing required to be done, was partly done, taking it in the most scrupulous point of view: it is not necessary, in every case, that the goods should be on board, to fix the insurer's liability, and this plainly appears from the decision in *Horncastle* v. *Suart.* The question, then, being whether or no there has been an inception of the risk, let us enquire what is an inception of the risk? That may be answered by the words of Lord *Kenyon*, in *Thompson* v. *Taylor.* "Here, as the Plaintiff had begun to perform his part of the contract, as he had done something under it, which, if matured, would have entitled him to his freight, I think he may recover on this policy, which was an insurance on that freight." This doctrine applies to the present case; here, something was done in part performance of the contract, which was not matured, because prevented by the perils of the seas; there was, therefore, a clear inception of the risk. The objection that there was nothing settled or definite in the contract,

tract, is completely answered by the case which has been referred to by my Brother *Richardson*.

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PARK J. I agree, that the cases ought not to be greatly extended, but we may certainly decide this without breaking in upon any authorities, particularly that of *Forbes* v. *Aspinall*. The Defendant's counsel asks for some agreement, on which the Plaintiff might have grounded a right of action, either in contract or tort; we do not proceed on the ground of the mode in which the Plaintiff might or might not have obtained redress for the breach of an agreement. The question is, was there a contract? In *Thompson* v. *Taylor*, (I am old enough to recollect all the cases cited, except *Tonge* v. *Watts*,) I thought, at the time, the case went too far; but the Court did not go on the ground that there must be a charter-party under seal; the question was, whether there was any contract, on which, but for the perils of the seas, the Plaintiff might have recovered. In the case of *Parke* v. *Hebson*, the contract was only deducible from letters. As to the alleged necessity of something being on board under the contract, in almost all the cases on this subject, the ship was lost before any thing was on board; it was thus in *Horncastle* v. *Suart*. In *Atty* v. *Lindo*, part of the cargo was on board, but not that part which was the subject of insurance. In *Davidson* v. *Willasey*, it is true, about half was on board. Without saying what sort of action the Plaintiff might have brought against the *East India* Company, it is sufficient to say, that this was a sort of engagement under which they would have been liable. What then prevented the Plaintiff from earning his passage-money? Loss by the perils of the sea. It is clear, that the Plaintiff had taken in water, and part of the materials which were necessary for his projected alteration; he had, therefore, begun to execute his part of the contract,

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tract, the completion of which would have entitled him to passage-money; that completion was prevented by the perils of the seas, and, therefore, he is entitled to his insurance.

BURROUGH J. If this contract had been *boná fide* completed, it is clear the Plaintiff would have had a claim against the *East India* Company. In consequence of their proposals, he begins an alteration in his ship, and, if the Company had failed in their engagements, they must have paid damages; nay, the Plaintiff would have been liable to them if he had failed, and he could not have entered into any engagement for the freight of other goods. This shows, that the contract was perfect in all its parts. It makes no difference whether the contract was by charter-party or otherwise; it is sufficient that there was a contract. The word charter-party frequently misleads, and is apt to convey the idea of something extraordinary; but there is no magic in the word charter-party, and an agreement of any sort is equally valid. If, then, there was a contract complete in all its parts, if every thing was done on the Plaintiff's part, up to the time of the loss, it would be the hardest case if he could not recover. As to the difference between freight and passage-money, what is it? In the one case, the thing to be carried is inanimate, and in the other it is alive. I can see no other difference.

RICHARDSON J. This is a policy at and from *Madras* on freight and passage-money, for 5000*l.* The jury find a verdict for 104*l.*, being the Defendant's proportion of the loss insured against; but the verdict is absolute for 48*l.*, and conditional as to 56*l.* The question, therefore, is, whether the Plaintiff is entitled to recover 56*l.* in addition to the 48*l.* It is unnecessary to consider whether the policy can be opened or the

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verdict disturbed; the only question is, whether the Defendant can recover the 56*l*. That depends on the question, whether there was a contract for the shipping of passengers, the profit of which the Plaintiff lost by perils of the seas; and I think there was such a contract. The ship is hired to carry fifty-six invalids; then, subject to certain alterations proposed by the Company, and acceded to by the Plaintiff, there is a further agreement for 200 invalids. Then follows a letter, communicating the result of the survey, and an assurance is given from the government of the shipment of these 200 men; and no question was made at the trial, as to the sufficiency of the vessel to convey these 200 men. The facts being thus before us, we must take it for granted that the ship would carry 200 passengers; that being so, the Company was bound to put them on board; and the only remaining question is, whether there was a subsisting contract under which the party could have recovered, but for its interruption by the perils of the sea. That there is no magic in a contract by charter-party, is clear, from the case of *Parke* v. *Hebson*. But, it is urged, there could not have been a contract, because something was to be done by the Plaintiff before the Company would send the 200 men on board, and the ship was to be fitted up in a particular manner. In most charter-parties, however, it is stipulated, that the owner shall fit up the ship in some way required by the charterer. Surely, it would be no objection to the recovering on an insurance of freight, that the ship was lost before she was completely rigged and fitted for sea. Suppose a charterer were to stipulate for additional bulkheads or partitions for a cargo of a particular description, it could be no defence to the insurer at and from the place of fitting out, that the ship was lost before the bulkheads were completed. As to the objection,

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jection, that the Plaintiff is not entitled to recover, if, perhaps, his gains might have been prevented by accidents other than the perils of the sea, the contrary has often been held, for there are many subjects of insurance which might, by possibility, be lost by other than the perils of the sea; if, however, they are actually lost by means of such perils, that is sufficient. Mercantile profits are an instance of this (a); from their very nature they may be defeated by many different accidents; where, however, there is a reasonable certainty that they would have been attained but for a loss at sea, the insurer of such profits is liable to pay the loss. That is a much stronger instance than the present. I think, therefore, the Plaintiff is entitled to recover the 56*l.*

Judgment for the Plaintiff.

(a) *Vide Thompson* v. *Taylor*, 6 *T.R.* 483., *verba Lawrence* J.

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JOHN BARFORD, Administrator of MARTHA ELIZABETH PITTS, v. VINCENT STUCKEY.

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Deed between *B. J. B.* and the Defendant of the one part, and *N. P.* of the other part, by which *B. J. B.* and the Defendant agreed with *N. P.*, his executors and administrators, to pay him an annuity for 21 years, if *B. J. B.* and the Defendant, or the survivor of them, should so long live; and if *N. P.* should die during the term without making any appointment of the annuity, to his child or children for the residue of the term; and if there should be no child, to the widow of *N. P.* *N. P.* died within the term intestate, and without appointment, leaving *M. E. P.*, an only child, who also died during the term intestate and without appointment. The wife of *N. P.* died during his life. Held, that the administrator of *M. E. P.* could not sue the Defendant on this deed for non-payment of the annuity.

DEBT on an annuity-deed, between *Barnaby John Bartlett* and the Defendant of the one part, and *Nathaniel Pitts* of the other part. By this deed, which was set out on oyer, after a recital (containing statements and conditions immaterial to the present decision) *Barnaby John Bartlett* and the Defendant did severally and respectively agree with *Nathaniel Pitts*, his executors and administrators, that they, *Barnaby John Bartlett* and the Defendant, would, during a term of twenty-one years, to commence the 25th *March*, 1810, in case they or the survivor of them should so long live, pay or cause to be paid to *Nathaniel Pitts*, or, in case of his death within the term, to the use of his child or children, if any, in such proportions as *Nathaniel Pitts* should by deed or will appoint, or, in default of appointment, to all of them equally, and, if there should be no child, to his then wife, if she should remain his widow, an annuity of 500*l.*, by half-yearly payments. Averments that *Nathaniel Pitts* died within the term, intestate, and without making any appointment; that *Martha Elizabeth Pitts*, his only child, afterwards died within the term, intestate, and without making any appointment; and that the wife of *Nathaniel Pitts* also died within the term, in the life-time of *Nathaniel Pitts*; that the Plaintiff took out administration of the

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effects of *Martha Elizabeth Pitts*, and that three half-yearly payments of the annuity were in arrear.

General demurrer and joinder.

Taddy Serjt, with whom was *Hullock* Serjt., in support of the demurrer. *Martha Elizabeth Pitts* is no party to this deed, and the action ought to have been brought by the administrator of *Nathaniel Pitts.* This deed is between parties, and where such is the nature of the deed, a stranger cannot take advantage thereof by way of action. *Scudamore* v. *Vandenstene* (a), *Storer* v. *Gordon* (b). And this doctrine applies as well to the action of debt as to the action of covenant, for *Scudamore* v. *Vandenstene* was brought in debt. Neither is this inconsistent with the case of *Gilby* v. *Copley* (c), or *Dutton* v. *Poole*, therein cited; for, in *Gilby* v. *Copley*, the promise was general, though the payment was to be made to a particular person. *Cooker* v. *Child* (d), and *Offly* v. *Ward*, there cited by *Levinz*, are nearly the same in their circumstances.

Lens Serjt. *contrà.* The action could not be maintained by any but the administrator of *Martha Elizabeth Pitts*, for she alone had the beneficial interest. [*Dallas* C. J. Surely the action might have been brought by the administrator of *Nathaniel Pitts.*] He certainly might have sued, but he would not do so unless he were indemnified; and when there is a party beneficially interested, it is hard that one uninterested should be exposed to the risk of an indemnity. The objection urged for the Defendant, applies only to actions of covenant, and not to debt or *assumpsit*. There is nothing in this case to interfere with the doctrine in *Scudamore* v. *Vandenstene*, for it was stated there that

(a) 2 *Inst.* 673.
(b) 3 *M.* & *S.* 320. 322.
(c) 3 *Lev.* 138.
(d) 2 *Lev.* 74.

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debt would not lie, only because the action arose out of the deed alone, there being no interest created beyond it; and the doctrine recognised in *Co. Lit.* 238, that no stranger can take advantage of a present interest conveyed by a deed, does not apply to those who claim in remainder. The ground of the present action is an interest substantially vested in the party complaining, and therefore *Storer* v. *Gordon* does not apply, because that was an action merely and necessarily on the covenant. The very cases put in *Scudamore* v. *Vandenstene*, shew the limitation of the doctrine there laid down; they are all cases in which the parties to the deed had no claim, except by the deed itself; and, therefore, could only sue on the deed. *Dutton* v. *Poole* (*a*), and *Gilby* v. *Copley* are authorities in favour of the Plaintiff. Lord *Mansfield*, in *Martyn* v. *Hind* (*b*), says it is a matter of surprise how a doubt could have arisen in *Dutton* v. *Poole*. In *Gilby* v. *Copley* is a judgment of three Judges on the very point.

Taddy, in reply, was stopped by the Court.

DALLAS C. J. It seems to me that this action cannot be maintained by the administrator of *Martha Elizabeth Pitts*, because she was no party to the contract, which makes it necessary to see between whom the contract really was. It was a contract between *Barnaby John Bartlett* and the Defendant of one part, and *Nathaniel Pitts* of the other part: and the daughter was in no respect privy or party thereto, though in a certain event she would take a beneficial interest. To the contract, therefore, we must look, in order to ascertain the rights of the parties, and it is a general principle, that the right to sue under a contract, is confined to the parties to a deed. Now *Martha Elizabeth Pitts* was no party to this

(*a*) 1 *Vent.* 318. 332. (*b*) *Cowp.* 443. *S. C. Doug.* 145.

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deed. The consideration did not move from her but from her father, and the obligation arises out of the contract itself. It is admitted, that an action might have been brought by the administrator of *Nathaniel Pitts*; if he had recovered, he would have been a trustee for *Martha Elizabeth Pitts*; and, if he had refused to sue, he might have been compelled by a court of equity to lend his name. It seems clear to me, therefore, looking to the contract and to the parties, that the action ought properly to have been brought by the administrator of *Nathaniel Pitts*, and not by the administrator of *Martha Elizabeth Pitts*. If the latter could also have sued, it might have occasioned two actions, and the Court must have been called on to stay one of them. I think, therefore, the action is improperly brought by the present Plaintiff.

PARK J. I am of the same opinion. In order to see whether this is a vested interest, we must look to the deed. By that instrument the interest vests in the administrator of *Nathaniel Pitts*, and not in *Martha Elizabeth Pitts*, or her representative. It was admitted by the counsel for the Plaintiff, that the administrator of *Nathaniel Pitts* might have sued; but it was urged, why should the burthen of a suit be thrown on him, when he had no interest for which to sue? But this is every day's practice, and, as to the hardship of acting under an indemnity, it is what every executor and trustee must do. As to *Martyn* v. *Hind*, Lord *Mansfield* said, that the contract was not with the bishop but with the curate. (a) The deed here being *inter partes*, it makes no difference whether the action was in debt or covenant. I find it difficult to understand the reasoning of *Dutton* v. *Poole*, or to see exactly how the parties in that case stood.

(a) *Cowp.* 443.

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BURROUGH J. There might have been more weight in the Plaintiff's argument, if the deed had contained a grant of an annuity, which it does not, but only a covenant to pay. In order to sustain the action, the deed must be shown; and then appear three objections to the claim of the present Plaintiff. First, that *Martha Elizabeth Pitts* was no party to the deed; second, that there was no contract with her; third, that she had no legal but only an equitable interest. So that the deed being stated, it clearly appears, that no interest exists on which the present action can be sustained. As to the case of *Dutton* v. *Poole*, I think that was rightly decided. It was the case of a father, who wished to raise a portion for his daughter. The son promised the father to pay the daughter this portion, if the father would forbear to cut down a certain quantity of timber; and the question was, if this amounted to a sufficient consideration to entitle the daughter and her husband to sue the son: undoubtedly it was sufficient. That case does not affect the present, in which, I think, judgment must go for the Defendant.

RICHARDSON J. I think this action is not maintainable by the administrator of *Martha Elizabeth Pitts*. The doctrine on this subject is clearly laid down in *Scudamore* v. *Vandenstene*, has long since become inveterate, and was lately recognized in the case of *Gordon* v. *Storer*. It has been admitted by the Plaintiff's counsel, that a stranger could not sue in covenant; but it is contended, that such stranger may sue on an interest arising out of the contract, though *dehors* the contract itself. This deed, however, provides for nothing but the contract itself; every thing contained in it is inducement, till we come to the promise made to *Nathaniel Pitts* and his executors, and after his death accruing to his children, if he should have

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any. It is necessary to the action that the deed should be stated; and, when that is stated, it appears that the Plaintiff is no party to it. Judgment, therefore, must be for the Defendant.

Judgment for the Defendant accordingly.

Nov. 16.

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Affidavit to hold to bail, stating that *R. M.* was justly and truly indebted unto the said *J. W.* in the sum of, &c. and upwards: "as the acceptor of a certain bill of exchange, bearing date, &c, drawn by the said *J. W.* for a valuable consideration on, and accepted by, the said *R. M.*, payable two months after the date thereof, and due at a day now past;" Held, to contain a sufficient description of the debt.

IN this case, the debt in the affidavit to hold to bail, was as follows: "*James Howe*, &c. &c., on his oath saith, That *Robert Macey* is justly and truly indebted unto the said *John Warmsley* in the sum of 45*l.*, and upwards, as the acceptor of a certain bill of exchange, bearing date the 10th day of *April* last, drawn by the said *John Warmsley* for a valuable consideration on, and accepted by, the said *Robert Macey*, payable two months after the date thereof, and due at a day now past."

Pell Serjt., on a former day, had obtained a rule *nisi* to have the bail-bond delivered up to be cancelled, on the Defendant's entering a common appearance, upon two objections. First, that in the affidavit, the relation between Plaintiff and Defendant did not sufficiently appear; the affidavit not setting forth in what capacity or character the Plaintiff sued. Secondly, that in the affidavit it was not sworn that the bill was unpaid. He said that the cases on the subject were contradictory.

Onslow Serjt., who was to have shown cause against the rule, was stopped by the Court; and

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Pell Serjt., being called on to support his rule, contended, that the word "indebted," was no sufficient substitute for a statement that the bill was unpaid; *Balbi* v. *Batley* (*a*) and *Perkes* v. *Severn* (*b*): the authority of *Ellenborough* C. J., in *Taylor* v. *Forbes* (*c*), showed that the greatest strictness of construction should be applied to these cases. Then, according to *Tidd's Forms* (*d*), it should have been stated that the bill was payable to the Plaintiff at a day passed. In *Machu* v. *Fraser* (*e*), *Gibbs* C. J. said, "The Plaintiff swears, the Defendant is indebted, on a bill drawn by the Plaintiff upon, and accepted by, the Defendant. Every word of this may be true, and yet the Plaintiff may not be entitled to arrest the Defendant; and, if so, certainly it is not such an affidavit as can support this arrest." *Bradshaw* v. *Saddington* (*f*) was not referred to in *Machu* v. *Fraser*; but, in *Bradshaw* v. *Saddington*, the affidavit expressly stated, that the bill was unpaid. By inference, the words used by the Plaintiff, in the case before the Court, might be sufficient; but the cases cited showed that nothing ought to be intended or inferred, and that the utmost strictness and particularity should be the governing principle of these affidavits. *Sands* v. *Graham* was also referred to. (*g*)

(*a*) 6 *Taunt.* 25.
(*b*) 7 *East*, 194.
(*c*) 11 *East*, 315.
(*d*) *c.* 8. *s.* 48. 4th ed.
(*e*) 7 *Taunt.* 171.
(*f*) 7 *East*, 94.
(*g*) *Mich.* 1819, *Nov.* 11. This Court made a rule absolute to discharge the Defendant out of custody upon entering a common appearance, on the ground that the affidavit of the debt, which arose on a bill of exchange, and on goods sold and delivered, was imperfect, because the affidavit did not state when the bill of exchange was due, *or* that it was due and not paid; and the Court said, that although the other part of the affidavit was for goods sold and delivered, that would not assist the Plaintiff, for the bill of exchange might have been given for the amount. The counsel for the Plaintiff then prayed leave to file a supplemental affidavit, which was refused. *Vaughan* Serjt. for Plaintiff; *Hullock* Serjt. for Defendant. MSS. *penes Hewlett.*

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DALLAS C. J. This is an application that the Defendant may be discharged, upon filing common bail, upon the ground of an alleged insufficiency in the affidavit to hold to bail. The case is that of an action by the drawer against the acceptor of a bill of exchange. The affidavit states the relation between the parties, (namely, that the Plaintiff is the drawer, and the Defendant the acceptor of the bill) the time when the bill was payable, and the fact of its having become due at a day then past, but, omits to state that the bill remains unpaid: and it is objected, first, that the relation between the parties is not shown with sufficient precision; and, secondly, that though the bill is stated to have become due, it is not clear that the bill is still unpaid. In the outset, it is necessary for me to observe, that this affidavit is conformable to the precedents in all the books of practice; one question, therefore, is, whether all these books are erroneous, and, in order to show that they are so, it has been said, that the cases are contradictory; for, if the matter were to rest on principle, there could not be a doubt entertained. It is necessary, then, to see if the cases be contradictory, in order, if possible, to arrive at their general result; and if that be impossible, to decide the point on principle. It is a general principle, that, in these affidavits, it is necessary to show a right to arrest; and such right is shown, by a statement of the cause of action: what shall be deemed a sufficient showing of the cause, must depend on the subject matter of the action. In actions for goods sold and delivered, many decisions have settled the forms usually pursued in such cases. I agree that the forms of these affidavits must be strictly pursued, for the reasons given by Lord *Ellenborough*, in *Taylor* v. *Forbes* (a). Independently of that case, there are many decisions on cases

(a) 11 *East*, 316.

of

of bills and promissory notes, in all of which it is said, that the relations in which the parties stand towards each other must clearly appear: and this has been sufficiently done as to the present Defendant. The next thing to be shown is, that the party has a right to arrest; it is not sufficient to show that the Defendant is indebted, and to show no more, because he may be indebted, and the day of payment may not be come on the day of arrest: it is necessary, therefore, to show, that the debt is payable, and that it remains unpaid. But, whatever shows that a bill is due, shows that it is payable and unpaid, and the party is not necessarily confined to any one precise form of words; if the affidavit shows that which is tantamount to the word unpaid, it will be sufficiently clear. Here the affidavit states, that the bill is due, and the acceptor indebted to the Plaintiff, as drawer of the bill, which would be impossible if the bill were paid. Any other construction of the expressions of this affidavit, would do violence to common sense and reason.

So far I have proceeded on principle, nor do any of the cases cited go to contradict this principle. In *Balbi* v. *Batley*, I admit, the affidavit was similar to the present; it stated, that the day of payment was past, without adding that the bill remained unpaid; but no objection was taken on this point; the objection was, that it did not appear that the bill was payable to the Plaintiff; and it was held, that the Plaintiff must show how he was related to the Defendant. But this case of *Balbi* v. *Batley*, was shaken in *Machu* v. *Fraser*, where it was observed, that the case of *Bradshaw* v. *Saddington* was not cited in the discussion of *Balbi* v. *Batley*. However, *Balbi* v. *Batley*, even if rightly decided, would not apply to this cause. In *Bradshaw* v. *Saddington*, the affidavit was, that the Defendant was justly and truly indebted to the Plaintiff, in the sum of 100*l*. and upwards,

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upwards, upon and by virtue of a certain bill of exchange, drawn by the said Defendant, and long since due and unpaid. The objection in that case was wholly different; it was that it was not stated in what character, whether as payee or indorsee, the Plaintiff charged the Defendant to be indebted to him. That case, therefore, is a direct authority against the first objection. The Court there said, "That the affidavit sufficiently indicated the ground on which the Plaintiff had holden the Defendant to bail; that it was upon a bill of exchange, drawn by the Defendant, on which he was justly indebted to the Plaintiff; and it was not necessary for the Plaintiff to specify in what particular character, whether as payee or indorsee, he claimed. In *Sands* v. *Graham* it was not stated when the bill became due; and for the reasons before stated, of course that was not sufficient. In common sense and reason, I can entertain no doubt; and when the cases are accurately looked into and traced, with the exception of *Balbi* v. *Batley*, they will be found to present no inconsistency. Upon the decided cases, therefore, alone, and if we could not resort to them, upon principle, it is clear, beyond all doubt, that this affidavit is sufficient.

The rest of the Court concurring, the rule was

Discharged.

LAMB v. FREDERICK SIMON NEWCOMB.
Same v. MARY EDWARDS. (a)

IN the first of these cases, the affidavit to hold to bail, sworn by the Plaintiff, stated that the Defendant was "justly and truly indebted to this deponent, in the sum of 400*l*.," "as indorsee of six several bills of exchange, four of the said bills for 50*l*. each, drawn by one *William Oldham* upon, and accepted by, the said *Frederick Simon Newcomb*, payable to the order of the said *William Oldham*, at a certain day now past, and indorsed to this deponent; and the two other of the said bills for the sum of 100*l*. each, drawn by *James Oldham* and Company, upon, and accepted by the said *Frederick Simon Newcomb*, payable to the order of the said *James Oldham* and Company, at a certain day now past, and indorsed to this deponent," &c. The affidavit, in the second case, sworn by the Plaintiff, stated, that the Defendant was "justly and truly indebted to this deponent, in the sum of 36*l*., as indorsee of a certain bill of exchange, drawn by *James Oldham* and Company, upon, and accepted by, the said *Mary Edwards*, payable to the order of the said *James Oldham* and Company, at a certain day now past," &c.

Affidavits to hold to bail: one by *A. B.*, stating *C. D.* to be "justly and truly indebted to this deponent" in a certain sum, "as indorsee" of bills of exchange "drawn by *E. F.* upon, and accepted by, *C. D.*, payable to the order of the said *E. F.*, at a certain day now past, and indorsed to this deponent." The other, by *A. B.*, stating *G. H.* to be "justly and truly indebted to this deponent" in a certain sum, "as indorsee of a certain bill of exchange drawn by *E. F.* upon, and accepted by, the said *G. H.*, payable to the order of the said *E. F.* at a certain day now past:" Held to contain a sufficiently certain description of the respective debts of *C. D.* and *G. H.*

Taddy Serjt. now moved that these bail-bonds might be delivered up to be cancelled, and that the Defendants might be discharged, on entering a common ap-

(a) These cases were decided on the 7th *November*, but it was thought advisable to place them after the preceding case.

pearance,

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pearance, on the ground that it did not appear that the Plaintiff had any right to sue on the bills of exchange mentioned in the affidavits; (no indorsement to the Plaintiff being stated in the latter of the affidavits, and the indorsement being stated too loosely in the former of them;) and that the proper form in such cases was, to state that the bill was payable to the drawer, or his order, at a certain day then past, and by him, the drawer, indorsed to the deponent (*a*). He cited *Perkes* v. *Severn* (*b*), and admitting that the prior case of *Bradshaw* v. *Saddington* (*c*) was, at first view, against him, observed, that in that case, the affidavit was, as perhaps it might be, in general terms, not setting out title; but that where the Plaintiff chose to set out his title, he must do it correctly.

Rule refused (*d*).

(*a*) See *Tidd's Pract. Forms*, 22.

(*b*) 7 *East*, 194.

(*c*) 7 *East*, 94.

(*d*) *Dallas* C. J. was absent.

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CHARLTON and Wife *v.* DRIVER.

Nov. 17.

A. being possessed of certain premises held under an archbishop by lease, renewable from time to time on payment of certain fines and fees, demises the premises for a term to *B.*, who covenants "that he will, from time to time, and at every time during the said term, pay to *A.* or the archbishop, such part of the fine and fees which, upon every renewal by *A.* of the lease by which he holds the premises demised, shall be paid, or payable, by *A.* in respect of the premises demised to *B.*" *A.* afterwards renews his lease under the archbishop for a period exceeding, by five years, the term demised to *B.*: Held, that *B.* was not liable, upon this covenant, to pay the whole of the fine and fees incurred by *A.* upon the renewal of his lease to the extent above mentioned, but only a part of such fine and fees, commensurate with the interest which *B.* had acquired in the premises.

AT the trial of this cause, before *Dallas* C. J., at the *Westminster* sittings after *Hilary* term, 1820, a verdict for the Plaintiff, for 60*l.* 3*s.* 4*d.*, was taken by consent, subject to the opinion of the Court, on a case, of which the following is the substance. The Plaintiffs, being possessed of an estate in *Surry*, which they held by lease from the Archbishop of *Canterbury*, dated the 9th *May*, 1812, for the term of 21 years, and which would expire on the 9th *May*, 1833, did, on the 20th *November*, 1816, in consideration of the rents and covenants reserved and contained on the part of the lessees to be paid and performed, grant an under-lease of part of the above estate to the Defendant and his brother (since deceased) for a term of 18 years, from *Lady-day*, 1815, in which last lease, the Plaintiffs covenanted with the lessees, at the end of the above term, to grant them a new lease of the said premises, for such further time as would make in the whole 59 years from *Christmas*, 1775, at the same rent, and which 59 years term so to be granted, would expire at *Christmas*, 1834, and at which period the interest of the lessees would determine altogether. There was a covenant in the last lease by the Defendant and his brother, *That they would, from time to time, and at every time during the said term of* 18 *years, pay unto the Plaintiffs, or the said archbishop, such part of the fine and fees, which, upon every renewal*

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by the Plaintiffs of the lease by which they held the premises thereby demised (among others), should be paid or payable by the Plaintiffs, in respect of the premises thereby demised to the Defendant and his brother. The lease, dated the 9th *May*, from the archbishop to the Plaintiffs, was a renewed lease, as was also the lease dated the 20th *November*, 1816, from the Plaintiffs to the Defendant and his brother, who paid to the Plaintiff their proportion of the fine and fees on such renewal. On the 9th *May*, 1819, seventeen years after the last lease from the archbishop was granted, the Plaintiffs again renewed their lease with the archbishop; and upon such renewal, the premises, the subject thereof, were demised by the archbishop to the Plaintiffs, for a term of 21 years, commencing on the 9th *May*, 1819, the date of such lease. This last term would expire on the 9th *May* 1840, and the 59 years term agreed by the Plaintiffs to be made up and granted to the Defendant and his brother, would expire at *Christmas*, 1834, when their interest would terminate. The Plaintiffs, on the last renewal, on the 9th *May*, 1819, paid to the archbishop the sum of 1,118*l.* for a fine thereon, and 16*l.* for the fees on such renewal, of which fine and fees so paid by the Plaintiffs for such renewal, the sum of 81*l.* 3*s.* 4*d.* was paid, in respect of the premises demised by the Plaintiffs to the Defendant and his brother, but with reference to such extended term granted to the Plaintiffs as aforesaid, and exceeding, in point of time, the interest which Defendant and his brother were entitled to in these premises five years and upwards. The Defendant's proportion of the above sums of 1,118*l.* and 16*l.* (in respect of that part of the estate which had been demised to him and his brother by the Plaintiffs,) in the event of the Defendant's being liable to reimburse the Plaintiffs so much of the fine and fees as was applicable to the whole extended term of seven years, obtained by such

such last renewal, as claimed by the Plaintiffs, was 81*l.* 3*s.* 4*d.*; but, in the event of the Defendant being liable to reimburse the Plaintiffs such part only of that sum as may be applicable to the Defendant's interest in the said premises, and to the period which would elapse between *Lady-day*, 1833, (when the Defendant's present lease would expire) and *Christmas*, 1834, (up to which time only he would be entitled to have the term granted to him and his brother enlarged, being one year and nine months, or thereabouts,) then his proportion of the above sum would be no more than 21*l.* The Plaintiffs declared in covenant on the lease of the 20th *November*, 1816, for 81*l.* 3*s.* 4*d.*, stating that sum under a *scilicet* as having been paid by them in respect of the premises demised to the Defendant and his brother, for the fine and fees on the last renewal. The Defendant pleaded that the Plaintiffs ought not to have their action for more than 21*l.* stating that such part of the said fine and fees upon such renewal as aforesaid, in respect of the premises demised to the Defendant, amounted to 21*l.* and no more, and a tender of that sum to the Plaintiffs, with a *profert in curiam* of the money tendered. The Plaintiffs replied, that such part of the said fine and fees so paid upon such renewal as aforesaid, in respect of the demised premises, amounted to a larger sum than 21*l.*, to wit, the said sum of 81*l.* 3*s.* 4*d.* mentioned in the declaration; whereupon issue was joined. The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover more than the sum of 21*l.* paid into Court. If so, the verdict was to stand; but, otherwise, a nonsuit was to be entered.

Taddy Serjt., for the Plaintiffs, argued that, from the express words of the covenant, and the length of the term granted to the Defendants, it was evident they intended

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intended and undertook to pay fines and fees from time to time, and to an amount more than commensurate with their interest in the premises.

Sed per Curiam. It is a reasonable, and almost a necessary, construction, that the Defendants intended to pay only fines commensurate with their interest in the premises. Let there be a

Nonsuit entered.

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HENRY WARTER and MARGARETTA MARY ELIZABETH WARTER, Infants, by their next Friend, *v.* JOHN HUTCHINSON (surviving Trustee), and MARGARETTA ELIZABETH WARTER, an Infant, by JANE WARTER, her Guardian. And JANE WARTER, Widow, and MARGARETTA ELIZABETH WARTER, by the said JANE WARTER her next Friend, *v.* JOHN HUTCHINSON and HENRY and MARGARETTA MARY ELIZABETH WARTER, by their next Friend and Guardian.

T. M. devised lands to trustees, their heirs and assigns, until his nephew, *J. R. M. W.*, son of his sister *M. W.*, should attain 21; and if he should die in the mean time, until *H. W.*, second son of *M. W.*, should attain 21; and if *H. W.* should die in the mean time, until the daughter of *M. W.* should attain 21; in trust, to raise out of the rents, or by sale or mortgage, 2000*l.*, and pay the same to *H. W.*, when he attained 21; and if *M. W.* should have more than one younger child, to raise out of the rents 3000*l.*, and pay the same among such younger children, share and share alike, when they should severally attain 21; and, upon further trust, to apply a proper sum out of the rents, for the education and maintenance of *J. R. M. W.* till he should attain 21, and then to pay him the residue of them, if any should remain after performance of the before-mentioned trusts; and, if *J. R. M. W.* should die before 21, then to apply a sufficient sum from the rents for the education and maintenance of *H. W.* till he should attain 21, and then to pay him the residue of the rents, if any should remain after performance of the before-mentioned trusts, and in the mean time to place out at interest, for the benefit of his nephews, the money arising from the said rents; and, when *J. R. M. W.* should attain 21, or, in case of his death, when *H. W.* should attain 21, or, in case of his death, when the daughter of *M. W.* should attain 21, to the use of *J. W.* and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent remainders; and, after the death of *J. R. M. W.*, to the use of the first, second, third, and all and every other son and sons of the body of *J. R. M. W.* lawfully issuing, severally, successively, and in remainder, according to priority of birth, and of the several and respective heirs male of his and their respective body and bodies lawfully issuing, the elder always to take before the younger, and the heirs male of his and their body and bodies issuing; and, in default of such issue, to the first, second, and third, and all and every other daughter and daughters of the body of *J. R. M. W.* lawfully issuing, severally and successively, according to priority of birth, and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies, always to take before the younger of them, and the heirs male of her and their body and bodies issuing;

THESE bills having been filed by the respective parties, for the purpose of carrying into effect the trusts of the will hereinafter stated, and declaring the rights of the several parties, the causes came on to be heard

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heard before his Honor the Vice-Chancellor, on the 17th *March*, 1820, when the following case, in substance, was ordered to be stated for the opinion of this Court: *Thomas Meredith*, of *Pentrebychan Hall*, in the county of *Denbigh*, by his will, dated the 8th *September*, 1801, duly executed and attested to pass real estates, (after directing payment of his debts and funeral expenses,) devised his capital and other messuages, tenements, lands, and hereditaments, with their respective appurtenances, charged with two annuities, to trustees, their heirs and assigns, until his nephew, *John Warter*, the son of his sister *Margaretta Warter*, should attain the age of 21 years; and, if he should die in the mean time, until *Henry Warter*, the second son of the said *Margaretta Warter*, should arrive at that age; and, if the said *Henry Warter* should die in the mean time, until the daughter of the said *Margaretta* should arrive to that age; upon trust, among other things, to raise out of the rents and profits of the premises, or by sale or mortgage thereof, or of a competent part thereof, the full sum of 2000*l*., together with all costs and charges attending the raising of the same, and to pay the same to the said *Henry Warter*, the younger son of his sister *Margaretta Warter*, as soon as he attained the age of 21 years; and, if his sister should happen to have more than one younger child, to raise out of the rents, issues, and profits of the premises, the full sum of 3000*l*., and pay the same to and amongst such younger children, share and share

ing; and, for default of such issue, to the use of *H W.* and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent uses and estates, and then to the use of his sons and daughters, in like manner as to the sons and daughters of *J. W.*; and, for default of such issue, to the use of his niece, the daughter of *M. W.*, and her assigns, for life, *sans* waste, and then to the use of her sons and daughters, in like manner as to the sons and daughters of *J. R. M. W.* and *H. W.*; and, for default of such issue, to the use of *M. W.* in fee: Provided that whoever became possessed of the lands should take devisor's name, and live in his house, otherwise the devise to be void as to the person refusing; his plate and furniture to remain in the house as heir-looms. *T. M.* died, leaving his sister *M.W.*, her sons, *J. R. M. W.*, *H. W.*, and three younger children, alive. *J. R. M. W.* married, and died under age, leaving a daughter, *M. E. M. W.*

Held, that, on the death of *J. R. M. W.*, *M. E. M. W.* became entitled to the lands devised, as tenant in tail male, subject to the annuities, &c.; that the heir-looms, being personalty, vested in her at the same time, and that she was entitled to the possession of them; and, that the personal representative of *J. R. M. W.* was entitled to the savings of the rents and profits of the estates accrued in the life-time of *J. R. M. W.*, subject to the annuities, &c.

alike,

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alike, as soon as they should severally attain their ages of 21 years; and, upon further trust, to pay and apply a proper sum of money, arising from the rents and profits of the premises, for the maintenance and education of his nephew, *John Warter*, till he should arrive to the age of 21 years; and, when *John Warter* should attain that age, to pay him the residue of the rents, issues, and profits of the premises, if any should remain after performance of the before-mentioned trusts; and, if *John Warter* should happen to die before he attained the age of 21 years, then to pay and apply a sufficient sum of the money arising from the rents and profits of the premises, for the maintenance and education of his nephew, *Henry Warter*, till he should attain the age of 21 years; and, when *Henry Warter* should arrive at that age, then, upon trust, to pay him the rest and residue of the rent, issues, and profits of the premises, if any should remain in their hands after performance of the before-mentioned trusts; and, in the mean time, to place out the money arising from the rents and profits of the premises, at interest, for the benefit and advantage of his said nephew; and when and as soon as *John Warter* should attain the age of 21 years, or, in case of his death, when and as soon as *Henry Warter* should arrive at that age, or, in case of his death, when and as soon as the daughter of *Margaretta Warter* should arrive at the age of 21 years, he gave and devised the premises, with their respective appurtenances, subject as aforesaid, to the said trustees, their heirs and assigns, to the use of his nephew, *John Warter*, and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent remainders; and, after the decease of *John Warter*, to the use of the first, second, third, and all and every other son and sons of the body of *John Warter* lawfully issuing, severally, successively, and in remainder, as they and every of them should be in priority of birth and seniority of age, and of the

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several and respective heirs male of his and their respective body and bodies lawfully issuing, the elder of such son and sons, and the heirs male of his body, being always to be preferred and to take before the younger of them, and the heirs male of his and their body and bodies issuing; and, in default of such issue, to the use of the first, second, third, and all and every other daughter and daughters of the body of *John Warter* lawfully issuing, (severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth,) and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies, always to be preferred and to take before the younger of them, and the heirs male of her and their body and bodies issuing; and, for default of such issue, to the use of his nephew, *Henry Warter*, the second son of the said *Margaretta Warter*, and his assigns, for life, *sans* waste; and, after the determination of that estate, to the use of trustees, to preserve contingent uses and estates; and, after the decease of *Henry Warter*, to the use of his sons and daughters, in like manner as to the sons and daughters of *John Warter*; and, for default of such issue, to the use of his niece, the last-born child of his sister *Margaretta Warter*, and her assigns, for life, *sans* waste; and, after her decease, to the use of her sons and daughters, in like manner as to the sons and daughters of *John* and *Henry Warter*; and, in default of such issue, to the use of his sister *Margaretta Warter*, in fee: Provided always, that *John Warter*, or whatsoever other person or persons should, by virtue of the devisor's will, become possessed of or entitled to his estates, should, from the time he, she, or they should become so possessed, take upon himself, herself, or themselves, the surname of *Meredith*, and should make the mansion-house of *Pentrebychan Hall*, aforesaid,

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aforesaid, their usual and common place of residence; and, in case *John Warter* should refuse or neglect to reside at, and make use of, *Pentrebychan Hall*, as his usual place of residence, and take upon himself the surname of *Meredith*, then the will was to be void, to all intents, with respect to him, and all and every other person and persons claiming under him who should so refuse to comply with such directions; and in like manner in respect to *Henry Warter*, and the daughter of *Margaretta Warter*, and every other person and persons claiming under them by virtue of the devisor's will, in case he or they should refuse to take the surname of *Meredith*, and reside at *Pentrebychan Hall*; and as to all his household goods and furniture, and all his silver plate whatsoever, that should happen to be at his mansion-house at *Pentrebychan Hall* at the time of his death, he ordered that the same, or any part thereof, should not be sold, disposed of, or removed from thence, but that the same, and every part thereof, should be deemed to be heir-looms, for the use of the heirs of *Pentrebychan Hall* for ever; of which will the devisor appointed *Richard Edwards*, and his aunt *Mary Newton*, executors.

The devisor being dead, his will was proved in the Consistory Court of *St. Asaph* by both executors. *Joseph Warter* and *Margaretta* his wife, *John Richard Meredith Warter*, (in the will called *John Warter*,) their eldest son, and *Henry Warter*, their second son, also named in the will, survived the devisor; and *Joseph Warter* and *Margaretta* his wife also had living, at the death of the devisor, three other younger children, viz. *Joseph*, *Thomas*, and *Margaretta Mary Elizabeth*, being the daughter mentioned in the will.

John Richard Meredith Warter, on or about the 5th *August*, 1816, duly intermarried with *Jane Jones*; and on or about the 6th *April*, 1817, died intestate, without

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having attained his age of 21 years, leaving *Jane Warter*, his widow, and *Margaretta Elizabeth Meredith Warter*, his only child by her and heir at law, him surviving.

The questions for the opinion of the Court are,

First, Whether, upon the death of the said *John Richard Meredith Warter*, under 21 years, the said *Margaret Elizabeth Meredith Warter*, his only child, became, and is now entitled, as tenant in tail male, to the said devised estates and premises, either as a legal or equitable estate; and whether she was entitled to the possession of the said premises immediately on the death of her father, or at any and what subsequent period of time.

Second, Whether the articles directed to pass as heir-looms, being personalty, vested in her absolutely; and whether she, on the death of her father, or at what other period, was entitled to the possession thereof.

Third, And who, whether the said infant child of the said *John Richard Meredith Warter*, his widow, or the said *Henry Warter*, is entitled to the savings of the rents and profits of the estates accrued due in the lifetime of the said *John Richard Meredith Warter*.

This case was twice argued: first, in *Trinity* term last, by *Peake* Serjt., for *M. E. M. Warter*, and *Blosset* Serjt. for *Henry Warter*; and now, by

Lens Serjt. for *M. E. M. Warter*, and *Vaughan* Serjt. for *Henry Warter*.

For *M. E. M. Warter*, it was thus argued:—*J. R. M. Warter* took a vested estate immediately on the death of the testator, though he was not to enter into possession till he attained 21. On his death, before attaining 21, his daughter took an estate in tail male. There are two sets of provisions in the will: one set relates to the maintenance and education of parties who may come into the estate while under age, and the disposition of the profits while such parties continue minors; the other

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other points out the course in which the testator intends the various objects of his bounty should succeed to the property. If the first of these two sets of provisions be taken separately, without considering the effect of the other at the same time, some confusion may arise as to what might have been the testator's intention; but if the two sets of provisions be considered together, as they ought to be, in order to collect the intention from the whole of the will, then it is clear that the living till 21 was never intended by the testator as a condition precedent to *J. R. M. Warter*'s being entitled to the estate, but was merely mentioned to specify the time when he should come into the management and controul of it, and the case then falls completely within the decision of *Manfield* v. *Dugard* (*a*), which was a stronger case than the present. That case was recognised in *Goodtitle d. Hayward* v. *Whitby* (*b*), where Lord *Mansfield* puts the very case now before the Court. The doctrine is well established, being founded on *Boraston*'s case (*c*), and repeatedly recognised in subsequent cases, *Doe d. Weedon* v. *Lea* (*d*), *Tomkins* v. *Tomkins* (*e*). If this be so, the trustees took a chattel interest sufficient to enable them to perform the trusts of the will; for, if these trusts could be performed by any quantity of estate less than a fee, the trustees take no more than is sufficient for their purpose, *Curtis* v. *Price* (*f*), *Doe d. Lee Compere* v. *Hicks* (*g*), *Doe d. White* v. *Simpson* (*h*). The heir-looms also vested in him when the estate vested, *Carr* v. *Lord Erroll* (*i*).—Sir *W. Cordell's* case (*k*), *Liefe* v. *Saltingtone* (*l*), *Dighton* v. *Tomlinson*,

(*a*) 1 *Eq. Ca. Abr.* 195.
(*b*) 1 *Burr.* 233.
(*c*) 3 *Rep.* 19. *Fearne*, 242. 6th ed.
(*d*) 3 *T. R.* 41.
(*e*) Cited 1 *Burr.* 234.
(*f*) 12 *Ves. jun.* 89.
(*g*) 7 *T. R.* 433.
(*h*) 5 *East*, 162.
(*i*) 14 *Ves. jun.* 478.
(*k*) *Cro. Eliz.* 315., cited in *Manning's* case, 8 *Rep.* 95. *b.*
(*l*) 1 *Mod.* 189.

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linson (*a*), *Yates* v. *Compton* (*b*), *Denn* v. *Satterthwaite* (*c*), were also cited.

For *Henry Warter*, it was thus argued: — It may be admitted that the provision in the will as to *J. R. M. Warter*'s dying before 21, is not a condition precedent; but it is a condition subsequent, which, on his dying before 21, devests the estate which vested in him on the death of the testator. The same words may effect the testator's intention, *Stocker* v. *Edwards* (*d*). The intention must prevail in a will, where that intention is consistent with law; but, then, the intention must appear on the will. Now, here there is no intention expressed by the testator to provide for the issue of *J. R. M. W.* in case of his leaving issue before 21. The event of his dying before 21, leaving issue, was not in the testator's contemplation; and if so held to be, many of the provisions of the will must be expunged. The testator had in view the possibility of *J. R. M. W.*'s dying without issue before 21; and for that contingency he has expressly provided, directing the profits in such case to go over to *Henry*. But it is clear, the contingency of *J. R. M. W.*'s dying before 21, and leaving issue, did not occur to his mind; for, if it had, there would have been a provision to meet such contingency; and it cannot now be provided for, unless the Court interpolates the words, "if he should die under 21 *without issue*," which there is the less ground for doing, as the will was evidently drawn by one skilled in law. The decision in *Edwards* v. *Hammond*, reported in *Shower* under the name of *Stocker* v. *Edwards*, turns entirely on the supposed existence of those words;

(*a*) 1 *Comyns*, 194. *S. C.* 1 *Peere Wms.* 149.
(*b*) 2 *Peere Wms.* 308.
(*c*) 1 *Bl.* 519.
(*d*) 2 *Show.* 398.

though

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though, upon a reference to the record in arguing a later case (*a*), they were found not to be in the will; but here the testator *nec voluit nec dixit*. Nothing is more usual than for a man to forget or omit provisions in a will, which it might have been prudent for him to have inserted, especially in such a case as the present for it is much out of the ordinary course of things that a man should marry, die, and leave issue, before he attains 21. But, if there be such an omission, the Court cannot supply it. If the testator meant the estate to descend to *J. R. M. W.'s* child in such a case, why has he left the rents and profits to *Henry*, upon *J. R. M. W.'s* death before 21? It is not necessary to answer the cases cited on the other side; they may all be admitted, and are not at variance with the present case. In those cases no condition was annexed to the devise, and the single question was, whether an estate vested or no; there were no words to raise the point, whether a dying before 21 would devest that estate. *Brownsword* v. *Edwards* (*b*) is very like the present case; and *Bromfield* v. *Crowder* (*c*) seems in point for what is now contended. So, *Doe d. Hunt* v. *Moore* (*d*), *Hodgson* v. *Ambrose* (*e*), and *Hay* v. *Earl of Coventry* (*f*), show that the words of a devise cannot be extended by implication. As to the other points, it may be admitted that the first taker of an estate tail would be entitled to the heir-looms, and that the trustees would not take a greater estate than would suffice for their executing the various trusts under the will.

In reply, it was urged, that *Bromfield* v. *Crowder*, and *Doe d. Hunt* v. *Moore*, turned on the particular provisions of the wills on which they were decided, and

(*a*) *Bromfield* v. *Crowder*, 1 *N. R.* 313.

(*b*) 2 *Ves.* 243.

(*c*) 1 *N. R.* 313.

(*d*) 14 *East.* 601.

(*e*) *Doug.* 323.

(*f*) 3 *T. R.* 83.

thus

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thus did not apply to the present case, if the two sets of provisions in *Thomas Meredith's* will were, as they must be, taken together. All the reasoning on the other side rested on the separation of these provisions, and the construing them singly; a construction which the Court would never make, but would rather seek to discover the intention from the contents of the whole will taken together. If so, the cases cited at first were directly in point.

The following certificate was afterwards sent:

This case has been argued before us by counsel; we have considered it, and are of opinion,

First, That, upon the death of *John Richard Meredith Warter*, under the age of 21 years, *Margaretta Elizabeth Meredith Warter*, his only child, became, and is now, entitled to the devised estates and premises, as tenant in tail male of the legal estate; and that she was entitled to the possession of the said premises immediately on the death of her father, subject, however, to the annuities, debts, and legacies charged by the will of *Thomas Meredith*.

Secondly, That the articles directed to pass as heirlooms, being personalty, vested absolutely in the said *Margaretta Elizabeth Meredith Warter*, on the death of her father, and that she was then entitled to the possession thereof.

Thirdly, That the personal representative of the said *John Richard Meredith Warter* is entitled to the savings of the rents and profits of the estates, accrued in the life-time of the said *John Richard Meredith Warter*, subject, however, to the said debts and legacies.

R. DALLAS,
J. A. PARK,
J. BURROUGH,
J. RICHARDSON.

Dec. 7, 1820.

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DALY *v.* BROOSHOFT.

Nov. 20.

A turnkey cannot be bail.

ONE of the bail brought up to justify in this case, was a turnkey of the King's Bench prison. He was opposed, as falling within the rule of *Hil.* 7 *Geo.* 2., which forbids sheriff's officers, and others concerned in the execution of process, from becoming bail; and the Court being of opinion that he fell within the rule, he was rejected.

Lawes Serjt. for the Defendant.

Onslow Serjt. for the Plaintiff.

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1. The declaration stated, that in consideration Plaintiff would, at the request of Defendant, lend him a horse, Defendant promised *to take proper care of the horse, and return him to Plaintiff in as good a condition as he was in at the time of the promise, or pay fifteen guineas*; the contract proved was, in addition to these terms, *that the Defendant should find the horse meat for his work*: Held, that the contract was sufficiently stated in the declaration, and according to its legal effect.

A party who borrows a horse is bound to keep it, unless an agreement is made to the contrary.

THE Plaintiff declared, that in consideration he would, at the request of the Defendant, deliver and lend the Defendant a certain horse, from the 10th of *November* to *Lady-day*, the Defendant undertook and promised that he would take proper care of the horse, and would, at *Lady-day*, return him to the Plaintiff in as good a condition as he was in at the time of the Defendant's making that promise; or that, on failing to do so, he would pay the Plaintiff 15*l.* 15*s.* Breach, that Defendant did not take care of the horse; nor did

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he, at *Lady-day*, return the horse in as good a condition as he was in at the time the promise was made; nor did the Defendant pay the 15*l.* 15*s.*

At the trial, before *Burrough* J., *Wells* Summer assizes, 1820, the contract proved was, in addition to the terms above stated, that the Defendant should find the horse *meat for his work*. Verdict for the Plaintiff.

Lens Serjt. having obtained a rule *nisi* for a new trial, on the ground of a variance between the contract stated in the declaration and that given in evidence, urged, that it did not appear, from the declaration, whether the Plaintiff or Defendant was to feed the horse during the time of the loan, and that, therefore, the whole of the consideration for the bargain was not stated.

Pell Serjt., for the Plaintiff, answered, that the consideration was set out in substance and effect; and that a promise to take care of a horse, is a promise to feed him, if nothing is shown to the contrary.

DALLAS C. J. If it had been part of the contract that the Plaintiff should feed the horse during the time of the loan, and he was not properly fed, the Defendant would not have been liable for that. Every contract must be truly stated, and according to its legal effect; but it is sufficient, if it be stated according to its legal effect. The point then, is, whether this contract is set out according to its legal effect; and we must, therefore, enquire what the law will imply on such a contract; and the natural presumption and intendment of law is, that a party who borrows a horse is bound to keep it, unless, at the time, something is said to the contrary. But independently of this, the rule as to setting out contracts is, that it is sufficient to set out

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such parts of them as are relevant to the consideration and breach, and will entitle the Plaintiff to recover. The Plaintiff, here, does set out that which will entitle him to recover. He does not complain that his horse has not been fed, but that he has not been returned in good order.

PARK J. expressed himself of the same opinion, and referred to *Cotterill* v. *Cuff* (a), *Tempest* v. *Rawling* (b).

BURROUGH J. It is a rule in pleading, that you need not set out what the law implies, and it implies here that the Defendant should feed the horse; if the Defendant did not feed him, how could he return him in as good a condition as he received him?

RICHARDSON J. It may not be necessary, in all cases, to set out the whole contract, but only so much as makes the consideration for the promise. I think the engagement to find meat was no part of the consideration for the Defendant's promise. If the converse had been the case, and the Plaintiff had engaged, it might have been so. Sufficient appears on the declaration, to show the consideration for the Defendant's promise. If a horse is lent, surely, the law, where nothing is agreed to the contrary, casts on the borrower the obligation of feeding the horse. But, in effect, the contract is so stated, when it is said, the Defendant promised to take care of him.

Rule refused.

(a) 4 *Taunt.* 285. (b) 13 *East*, 18.

Nov. 21.

PEACOCK *v.* PURVIS.

A stranger became possessed of a crop of growing corn by purchase at a sale under a *fieri facias*, upon which sale the landlord was paid a year's rent. The landlord, before the corn was ripe, distrained it for rent due subsequently to the sale: Held, that the distress was ill.

Growing corn sold under a *fieri facias* cannot be distrained for rent, unless the purchaser allow it to remain on the ground an unreasonable time after it is ripe.

REPLEVIN for growing corn. Cognizances for half a year's rent, due the 12th of *May*, 1819. Pleas. First, *non tenuit*; second, a writ of *fieri facias* issued upon a judgment recovered by the Plaintiff, in *Hilary* term, 1819, against *W. Peacock*, under which the sheriff seized the corn on the 28th *April*, 1819, and, having paid the landlord one year's rent, sold the corn (not saying by agreement in writing) to the Plaintiff, who then became possessed of the same. There were also pleas, stating a custom for a waygoing crop. General demurrer and joinder.

Hullock Serjt., for the Defendant, stated the question to be, whether growing corn seized under a *fieri facias* is liable to the landlord's distress, in respect of rent accruing subsequently to the seizure under the *fi. fa.*, the sale, and the sheriff's departure, [*Burrough* J. And before the corn could be taken away] and objected, first, that the pleas were bad on the face of them, in respect of their not showing (as he contended they ought under the statute of frauds), that the property in the corn (being an interest in land) was transferred to the Plaintiff by writing, a degree of certainty necessary in a plea, though the rule might be otherwise as to a declaration. *Case* v. *Barber* (*a*), *Emmerson* v. *Heelis* (*b*), *Crosby* v. *Wadsworth* (*c*). But the Court being against him on this point, and observing that assignments of terms of years were commonly pleaded without a statement of any writing, he then urged, that admitting that growing crops could be taken in execution

(*a*) Sir *T. Raym.* 450. And see 1 *Wms. Saund.* 276. *n.* 1, 2.

(*b*) 2 *Taunt.* 38.

(*c*) 6 *East*, 602.

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(which could not now be disputed, though it was by no means clear how the law became established), a party who purchased such crops under a *fieri facias*, purchased them, subject to all the legal liabilities which attached to them. Liability to a distress for rent was an inseparable incident to all goods found on a tenant's premises, and, by the 11 *Geo.* 2., growing crops were, in this respect, placed on the same footing as goods and chattels. If a party bought a horse or cart under an execution, and chose to leave them on the premises, it was clear, they were liable to distress. If this corn had been sold by the tenant, it would also have been clearly liable, and the sheriff could only sell it, subject to the liabilities and charges which he found attached to it. Things purchased under an execution should be taken away at once, for they are not protected after the sheriff is gone, *Blades* v. *Arundale* (a); and, therefore, the corn, in the present case, could not be *in custodiâ legis.* So that, before or after it was cut down by the purchaser, the landlord was entitled to distrain it, like any other chattel on the premises. *Parslow* v. *Cripps* (b) and *Eaton* v. *Southby* (c), seemed to countenance this doctrine, though there was no decided case on the subject: but in *Gwilliam* v. *Barker* (d), there was a dictum of *Thomson* C. B. exactly in point. If the law were otherwise, the landlord might always be defrauded of the rent for a tenant's offgoing crop, by the tenant's colluding with some fictitious creditor, and transferring the crop under an execution.

D'Oyley Serjt. for the Plaintiff. If the doctrine advanced on the other side be law, all writs of *fieri facias* for the sale of growing crops will be nugatory; for no

(a) 1 *M. & S.* 711.
(b) 1 *Comyns*, 204.
(c) *Willes*, 131.
(d) 1 *Price*, 277.

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man will buy, unless he can be assured of reaping the fruits of his purchase. Though, after the departure of the sheriff, crops sold under an execution are not absolutely *in custodiâ legis*, yet they are still within the object and scope of the proceeding; that proceeding is not a mere form to transfer the property to a purchaser, but has for its object to satisfy a judgment creditor, who will never be satisfied if a landlord can intervene and deprive him of his purchase. Admitting that, after a sale by the tenant himself, the crop, if not taken away, would be liable to distress by the landlord, the case here is very different from that of a sale by the sheriff. The sale by the tenant is not like that by the sheriff, a transfer by operation of law, to satisfy a judgment creditor, with a provision to guard the rights of the landlord, by allowing him a year's rent before any thing is paid over. In all the cases where a landlord has been permitted to distrain goods sold under an execution, the purchaser has left them, voluntarily, on the premises, omitting to remove them within a reasonable time: but here, the purchaser was obliged to leave his crop to ripen, and could not take it away before harvest time, without committing waste and spoliation. So that the only question in all these cases, is, whether or no the property has been removed within a reasonable time; with respect to growing crops, the reasonable time must certainly extend to harvest. It would be most unjust, if the landlord, having had one year's rent out of the sale of the crop on the *fieri facias*, should now be permitted to distrain for another half-year on the same crop. As to the cases, there is not one which authorises the Defendant's plea. In *Eaton* v. *Southby*, the decision turned on another point, namely, that the emblements of an offgoing tenant were not distrainable for the rent of an incoming tenant. The dictum of *Thomson* C. B., in *Gwilliam* v. *Barker*, was extrajudicial, and

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and seems to be contradicted in *Hoskins* v. *Knight* (a). *Blades* v. *Arundale* does not apply.

Hullock, in reply. Executors and assignees take by operation of law, and yet goods in their hands are distrainable for rent due from the testator or bankrupt: but the party here does not come in by operation of law. The sheriff, indeed, may sell by operation of law, but the purchaser takes under his contract.

DALLAS C. J. Though this question is not altogether new, there certainly are no decisions expressly in point. But different cases have been referred to; first, one in *Willes*; next, a case containing a dictum of the late Lord Chief Baron; and I shall begin by adverting to these, before I proceed to investigate the principles on which the present case must turn. In the case in *Willes*, the question now before us was not decided, although it was presented for the consideration of the Court; because, upon the facts of that case, it became unnecessary to decide it. But it was certainly stated, that if the present question should occur, "it might have required very good consideration, it being a point of great consequence. That goods taken in execution, or even goods distrained damage feasant, are in the custody and under the protection of the law, and, therefore, cannot be distrained for rent, is expressly holden in *Co. Lit.* 47 *a.*, and several other books; and we are inclined to be of this opinion." — "But we think we have no occasion to enter any further into this matter, because we are all clearly of opinion, that if there had been no execution in the present case, yet the corn could not be distrained." That case, therefore, only proves the Court to have thought, that this point, if presented for decision, would have required their best consideration. *Gwilliam* v.

(a) 1 *M. & S.* 245.

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Barker was similar, in fact, to the present case, though the question before the Court in that case is not the question here.

It is admitted that a dictum is to be found in that case, in favour of the landlord's right to distrain, but that was not the point on which the decision turned; and this dictum of a moment is perhaps impaired by what follows. "I do not think the statute applies to corn in the blade; it would be a monstrous thing to cut it in such a state." So that it seems inconsistent with the argument used to-day, and with the statute, because by the statute, corn in the blade may be distrained. This, therefore, being a new question, that is a new question in judgment, and one on which no express decision can be found, we must recur to principle, in order to arrive at a decision; and, in considering the point on principle, we must look to the reason and sense of the thing. With respect to an execution on goods, the course of the sheriff is clear and easy; he seizes, makes a bill of sale, delivers the goods to the purchaser, and retires; and why does he deliver the goods? because he can deliver them, and is therefore bound to do so: that makes it necessary for us to consider the distinction between goods and growing corn. It is admitted, the law authorises growing corn to be seized; and why? to satisfy the judgment.

But the writ of *fieri facias* would be quite nugatory towards such a purpose, in a case like the present, if the right of the party were to cease the moment the bill of sale is executed, and if he were not allowed to wait till the corn became ripe and valuable, in order to reap the benefit of his purchase. With respect to goods, it is true, the sheriff, or the person purchasing of him, is bound to remove them within a reasonable time; but it is to the delivery that the law looks, and that must be made within a reasonable time; so here, the sheriff is

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bound to deliver, and in a reasonable time; but being so bound, when is it he can deliver? when the corn is ripe; and, after that period, it must not remain an unreasonable time. The question, therefore, always is, what is a reasonable time for delivery? and I fully agree with the counsel for the Plaintiff, that the delivery of the crop and the satisfaction of the judgment, are the objects of the law; that not only things actually in the hands of the sheriff are *in custodiâ legis*, but that, virtually, all things taken in execution remain in such custody till the sheriff can deliver them, so as to give effect to the judgment. If there be any doubt as to this, we should refer to the statutes respecting landlords; by those statutes, growing corn is considered as goods; and the provisions touching a distress of such corn are, that it is to be distrained as if it were goods and chattels. I put, therefore, the same construction on this case, in favor of creditors, as obtains, under the statutes, in favor of landlords. My opinion clashes with no authority; and being called on to decide on principle, I think, on principle, the Defendant had no right to distrain.

PARK J. The question was well put by the counsel for the Defendant, with the addition which was made by my Brother *Burrough*; and that is the fair question in this case. If the decision of the Court were any other than it is to be, the effect of the law would be entirely destroyed; because, how could the law be available to execution, if those who purchased under a sheriff were not allowed to retain what they had bought? But the doctrine is not entirely new; for, though there was no direct decision on the point in the case in *Willes*, the language of the Court, there, is a pretty strong argument, to show that their opinion was against what the Defendant contends for. I agree with the counsel for the Plaintiff in his argument, that if the law autho-

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rises this property to be taken under an execution, it authorises every thing which will make that execution available. Here, all was done which was requisite to render the seizure legal; the landlord had his deduction fairly allowed at the time, and the purchaser must be allowed to retain what the law has given him.

BURROUGH J. I have a high opinion of whatever proceeded from the late Chief Baron *Thompson*, but I do not think that which has been ascribed to him was his deliberate opinion; and the intimation of the Court in *Willes* is an authority the other way. I am clearly of opinion that these goods were in the custody of the law. For, how does the case stand? Here is a judgment creditor, who purchases growing corn under an execution, but he has no satisfaction till the corn is carried away, and till then, he is under the protection of the law. The case of assignees and executors differs from the present: they stand only in the place of the bankrupt and testator, and there is a continuation of the same right of property; here, the property is transferred from one hand to another. Supposing we were not to decide as we have done, it would only alter the practice, and cause executions to be kept alive from term to term, it being clear that the landlord is entitled to no more than one year's rent on the execution of a *fieri facias*.

RICHARDSON J. I am of opinion, that crops in the hand of the sheriff's vendee are protected from distress; and this is a necessary consequence of allowing such crops to be liable to seizure. That, however, is clearly so, though little on the subject is to be found in the books. It has always been held as undoubted, which perhaps is the reason why so little appears; such crops are *fructus industriales*, which would go to the executor, and therefore have been considered seizable as goods and

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and chattels. But, where the law authorises a seizure, it authorises all that which will make the seizure available. Now here the seizure would be utterly unavailable, if the purchaser could not retain that which he bought under the sheriff's sale. *Eaton* v. *Southby* comes very near the present case, though there it was not necessary to decide the point; but the Chief Justice, in delivering the judgment of the Court, thought growing crops might be protected after sale by the sheriff. Though the statute of 11 *Geo.* 2. gives landlords great powers, which they did not possess before, yet it only enabled them to distrain crops in the same manner as other goods. But other goods must always be taken as subject to any prior rights which may have attached to them: here, a right had attached to the crop in question, incompatible with the landlord's distress. In order, therefore, to make the writ of *fieri facias* available to the purposes for which, by law, it was intended, there must be, in this case,

Judgment for the Plaintiff.

ABBOTTS and Another *v.* BARRY.

Nov. 25.

The Defendant having fraudulently induced the Plaintiff to sell goods to *A.*, who could not pay for them; and, on the nominal re-sale of these goods by *A.*, in which the Defendant was really concerned, having obtained himself the money paid on such re-sale: Held, that the Plaintiff might, in an action for money had and received, recover of the Defendant the value of the goods unpaid for by *A.*

ASSUMPSIT for goods sold and delivered, money had and received, and the other money counts (*a*). The following case, in substance, was proved at the trial

(*a*) There was a special count, which was abandoned.

 before

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before *Park* J. (*London* sittings after *Trinity* term last): *Phillips* being indebted to the Defendant, for the purpose of discharging the debt, procured wines from the Plaintiffs, by a string of contrivances, which amounted to a gross fraud, paying the Plaintiffs only half the price of the wines, and giving a bill, which was of no value, for the residue. In these contrivances, the Defendant was prime mover and participator, and furnished *Phillips* with the money to pay in part. The wines were then, under Defendant's direction and brokerage, sold in *Phillips*'s name, to *Bunyan*, who accepted a bill drawn by *Phillips* for the amount, which *Phillips* immediately indorsed to the Defendant.

The jury found a verdict for the Plaintiffs, on the ground that a gross fraud had been practised on them by the Defendant; the learned Judge giving leave to the Plaintiff to move to set aside this verdict, and enter a nonsuit. Accordingly,

Vaughan Serjt. having, in the last term, obtained a rule *nisi* to that effect;

Pell Serjt. now showed cause, and, after stating the circumstances of the fraud, cited *Hill* v. *Perrott* (a) as governing the present case, which *Dallas* C. J. said he could not, in principle, distinguish from the present.

Vaughan Serjt., *contrà*, endeavoured to mitigate the fraud, and to distinguish the case from *Hill* v. *Perrott*, observing that, in that case, the action was for goods sold and delivered; and contending that, in the pre-

(a) 3 *Taunt.* 274.

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sent case, there was no money actually had and received.

DALLAS C. J. I think that this rule ought to be discharged, and upon this plain ground, that the jury have found a fraud in the Defendant, committed by him through the medium of *Phillips*. Nor can I distinguish between *Phillips* and the Defendant in the prosecution of this fraudulent transaction, for *Phillips* stands in the light of agent to the Defendant, throughout the whole contrivance. But it is not necessary to go that length, nor do I wish to come to any decision uncalled for by the case before the Court. I confine myself, strictly, to this. Here was a sale of wines, the property of the Plaintiffs, brought about by fraud and collusion, in which the Defendant, who was to reap the benefit of such sale, was prime mover. Now, it is admitted, that a sale effected by fraud, works no change of property; the property, then, in this case, remained in the original owner, and therefore I hold the profits of the sale in the hands of the Defendant, to be so much money had and received by him, to the use of the Plaintiffs, who were the original proprietors. On this ground, I am of opinion, that this application must be dismissed.

PARK J. This was a case of the most gross fraud, practised by the Defendant on the Plaintiffs, through the instrumentality of *Phillips*, and no violence will be necessary to bring it within the decided cases. *Hill* v. *Perrott* is not, in principle, to be distinguished from this case; and I have a manuscript note of an additional point which was ruled in the case of *Corking* v. *Jarrard*(a).

(a) 1 *Campb.* 37.

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It appeared there, that a servant had received money from her master, and applied it to the purposes of lottery insurance. Lord *Ellenborough* held, on the authority of *Clarke* v. *Shee* (*a*), that the master might recover the money back from the lottery-office keeper, as money had and received.

Burrough J. concurred.

Rule discharged (*b*).

(*a*) *Cowp.* 197. (*b*) *Richardson* J. was absent.

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Whitehead *v.* Howard.

Declaration, that Defendant, on consideration, &c. promised to invest Plaintiff's money on good security: Breach, that he invested it on bad security: Pleas, general issue and statute of limitations: Replication, that Defendant promised as above, within six years: Proof, that within that time Defendant acknowledged the security to be bad, and promised that Plaintiff should be paid: Held, that Plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied.

Held, also, that the Defendant was not liable on a count upon an account stated; nor on a count for money had and received, as having received money for one purpose and applied it to another.

ASSUMPSIT. The first count stated, that, in consideration the Plaintiff would employ Defendant, &c., Defendant undertook to invest certain monies of Plaintiff's in good, valid, and sufficient security. Breach, that the Defendant invested Plaintiff's money in bad security. There were other counts varying the statement, the usual money counts, and a count on an account stated. Pleas, general issue and statute of limitations. Replication, " That Defendant did, within six years next before the commencement of this suit, undertake and promise in manner and form as the Plaintiff hath above thereof complained against him."

At

At the trial, before *Dallas* C. J., *Middlesex* sittings after *Trinity* term last, it was proved, that the Plaintiff, in 1808, had employed the Defendant to invest money for him by way of annuity; that part of the security proposed by the Defendant, consisted of some copyhold premises, supposed to belong to one *Alston*; that the Defendant never inspected the rolls of the manor in which the copyhold was situate; that though, in fact, *Alston* possessed no such copyhold, the Plaintiff's money was made over to *Alston*, who granted an annuity for it, which was paid by the hands of the Defendant, till 1814, when *Alston* became bankrupt; that, at the time of the transaction, the Plaintiff's two sons were clerks in the Defendant's office, were in some degree consulted by the Plaintiff, and might, if they had thought fit, have inspected the rolls of the manor; that, upon *Alston*'s bankruptcy, and the state of the security being discovered, *Gibbs*, the Defendant's managing clerk, promised that the Plaintiff should be paid, which promise was afterwards recognised and confirmed by the Defendant.

The jury found a verdict for the Plaintiff, the learned Judge reserving it to the Defendant to move to set aside the verdict, and enter a nonsuit. Accordingly,

Vaughan Serjt. having obtained a rule to that effect,

Lens and *Pell* Serjts., for the Plaintiff, admitted, that there might be some difficulty as to the special count, or the subsequent promise, after the decision in *Short* v. *M'Carthy* (a); but, at all events, the money might be recovered, on the count for money had and received, on the ground that when a party receives money for one purpose and applies it to another, the party furnishing the money may call for it again, in consequence of his

(a) 3 *B.* & *A.* 626.

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instructions not having been pursued. Here, the Defendant received the money, for the purpose of investing it in good security; but, disobeying such instruction, he chose to invest it in bad security; and after this misapplication, the Plaintiff could only consider the Defendant as having, at least, received the money to the Plaintiff's use. [*Dallas* C. J. You must make out that the Defendant received the money; whereas it was transferred to *Alston*, and the annuity actually paid for some time.] It was very probable, from the evidence, that *Alston*'s name was only colorably introduced, and that he never, in fact, received the money. The annuity was never, in fact, paid by him to the Plaintiff, but only an account kept up in the Defendant's books; and this, coupled with the Defendant's expressions, must certainly entitle the Plaintiff to recover on the count upon an account stated.

Vaughan Serjt., *contrà*, was stopped by the Court.

DALLAS C. J. I am of opinion, that, in this case, a nonsuit must be entered. I shall first consider the case as it stands upon the facts, and those facts I shall first view, without reference to the manner in which the action is framed. It appears, then, that *Howard*, who carried on the business of negotiating annuities, was employed by *Alston*, to raise a sum of money upon annuity security. *Howard* applied to the Plaintiff, or the Plaintiff to *Howard*, one or the other, it is immaterial which; but the material fact is, that *Howard* represented part of the security to consist of a copyhold estate, which he said *Alston* possessed, but which, it turned out, *Alston*, at that time, did not possess; *Howard* having made no search or enquiry one way or the other. It is necessary to observe here, that the Plaintiff did not repose his confidence in *Howard* alone; he confided also in his

his own sons; they might have made a search if they had thought it fit, and there was a negligence in their not doing so. It does not appear that there is any thing in the facts of the case, which would warrant us in saying, that there was any fraud on the part of *Howard*; but clearly there was gross negligence. Supposing, then, an action to have been brought against *Howard*, on the ground of his not exercising a proper degree of care in his business, in such an action, properly framed, the Plaintiff might certainly have recovered. This action is not so brought, but is framed on the footing of an express undertaking having been given by *Howard*, for the validity and sufficiency of the security in question. Here, it appears, the Defendant's liability on such an undertaking, is barred by the statute of limitations, unless a subsequent promise can be established; and, if so, the first question would be, whether the liability of the Defendant can be revived by any subsequent promise to pay a debt, with which he was not originally chargeable; and, upon this head, there can be no ground for doubt, the debt originally not being any debt of *Howard*'s. To revive a debt by promise, and take a case out of the statute, there must be an antecedent debt; and if a promise should be made, where there is no antecedent debt, it would be necessary to frame a special declaration on such a promise. Confining myself, then, for the present, to what appears in the special count of the declaration before me, it seems to me, that this case is decided by that of *Short* v. *M'Carthy*. The facts of that case were, that in *December*, 1812, the Plaintiff having agreed to give a Mrs. *Shaun* 340*l.* for her interest in 700*l.* bank annuities, applied to the Defendant, who was an attorney, for the purpose of having the bargain carried into effect. The instructions given, were, that the Defendant should see that every thing was right. The deeds were accordingly prepared

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prepared and executed at the time, and the money was then paid by the Plaintiff. It subsequently turned out, that no enquiries had been made at the Bank of *England*, and that there was no such stock to which Mrs. *Shaun* was entitled; this discovery was made in *August*, 1818. So far the two cases are similar. Here, the Defendant omitted to search the rolls of the manor; there, he neglected to search the books of the bank. The action against the Defendant in that case, having been commenced subsequently to 1818, he pleaded that the cause of action did not accrue within six years, and it was held, that the Plaintiff was entitled to recover. Then follows that which makes the two cases exactly agree. "The Defendant, on being applied to," (in *August*, 1818) "said that it was owing to an omission of his clerk, and that he was responsible." The Court held, that there could be no recovery on this subsequent acknowledgment, except under a declaration framed for the express purpose. Admitting, then, the negligence of the Defendant here, in not having searched the rolls of the manor, and admitting his having made an absolute promise to pay, (which I think a little questionable, but the jury having so found it, we must take it to be an absolute promise,) *Short* v. *M'Carthy* is precisely in point to show, that, upon a special count such as the present, the Plaintiff cannot recover. This brings me to the count for money had and received, and there is no foundation whatever for the Plaintiff's recovering on that count.

It is urged, that the Plaintiff may recover on this count, because the consideration having totally or partially failed, by the failure of the security and the annuity ceasing to be paid, the Plaintiff's money must be deemed to have been had and received by the Defendant to the Plaintiff's use. With respect to that, if there were any foundation for so contending, the argument

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ment would have been used in *Short* v. *M'Carthy;* but it never occurred to the counsel there, to turn round and say, that on the consideration failing, the broker could be deemed to have received the money, which, in fact, went to his employer. Is this, then, money had and received by *Howard* to the use of the Plaintiff? If an action had been brought against *Alston,* on the ground of the consideration failing, he would have been bound to pay, and that alone might be an answer to the question, whether *Howard* had received this money to the use of the Plaintiff. So to construe it, would be to extend the doctrine of money had and received, infinitely beyond all bounds, within which it has hitherto been confined. It may be admitted, that, if this were a mere colorable transaction, and *Alston* had never received the money, it might be placed on the footing of money had and received; but what are the facts? the money was to be paid over to *Alston;* it was actually paid over, and *Alston* continued to pay the annuity till he became bankrupt. Can it be said that *Howard,* because he was guilty of negligence, became the party who granted the annuity, who received the consideration for it, and paid the annuity? If he received the money at all, he received it to the use of *Alston;* and here, the Plaintiff has not only been paid on account of the annuity by *Alston,* but has proved the debt under his commission. There is no pretence for saying that any ground exists for the Plaintiff's recovering on the count for money had and received; and as little is there for saying he ought to recover upon the account stated. A party can only recover upon a count on an account stated, where a debt actually exists. Here, there was no debt from *Howard,* who only negotiated between the Plaintiff and *Alston.* I am, therefore, bound to adhere to the opinion which I formed at the trial.

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PARK J. I am of the same opinion, though some difficulty was raised at first, by the apparent hardship of the case. We must take care, however, that such appearances do not lead us to decide contrary to what is law. There being no special count as to any revival of an old debt, we must assume that this was an absolute promise, and then the case is not distinguishable from that of *Short* v. *M'Carthy*. I am not aware of any case where the doctrine of a revival, after the operation of the statute of limitations, has applied to any thing but an actual debt. Here, there was no debt contracted by the Defendant, but he was guilty of gross negligence. The great point was, to show that this was money had and received by the Defendant to the use of the Plaintiff, and it was dexterously argued, that it was doubtful, from the evidence, whether *Alston* ever had the money at all, and that, therefore, the introduction of his name by the Defendant, might have been merely colorable; but, as no fraud was found by the jury, it would be too much to assume this, after the lapse of so long a period. As to the count on an account stated, a debt must have existed, to render that count available. I think, therefore, that a nonsuit must be entered.

BURROUGH J. The only action proper in this case, would have been an action for negligence, but the time for that has long gone by, and contracts of this sort are not capable of being revived by any subsequent promise. An action for money had and received will not lie against a person who immediately pays the money over under the directions of the Plaintiff; and it is clear, from the circumstance of the annuity having been paid six years, that this money was paid by the Plaintiff, in order to its being immediately paid over to the grantor of the annuity; then, in order to recover on a count for an account stated, there must be an existing debt. I

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am further of opinion, in this case, that there was no absolute promise to pay, on the part of the Defendant, but a promise to pay, contingently, on the event of *Alston's* effects turning out insufficient; and what was said by the Defendant subsequently, must have had reference to this contingent promise.

Rule absolute (*a*).

(*a*) *Richardson* J. was absent.

(IN THE EXCHEQUER CHAMBER.)

ANDREW DAVIDSON, WILLIAM JONES, and WILLIAM JENNER, *v.* THOMAS CASE.

Nov. 27.

Ship and freight were insured by separate sets of underwriters. The ship (a general seeking ship) was captured; and ship and freight were abandoned to the respective underwriters, who each paid a total loss. The ship, being re-captured, performed her voyage and earned freight: Held, that the underwriter on ship was entitled to the freight.

Abandonment of ship to the underwriter on ship includes freight, and transfers freight earned subsequently to the abandonment to such underwriter, as incident to the ship.

ASSUMPSIT by the Defendant in error for money had and received, and the other usual money counts, to which the Plaintiffs in error pleaded the general issue. At the trial before Lord *Ellenborough* C. J. at *Guildhall*, at the sittings in *Trinity* term 1815, the jury found a verdict for the Defendant in error for 71*l.* 12*s.* 10*d.* damages, subject to the opinion of the Court of K. B. upon the following case:

Messrs. *Brotherston* and *Begg* were the owners of the vessel called *The Fanny;* she was a general seeking ship, and sailed on a voyage from *Rio de Janeiro* to *Liverpool* with a cargo of goods on freight, the property of differ-

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different persons. On the 27th *January*, 1814, the owners insured the vessel on the said voyage, valued at 7000*l.*; and on the 22d *April* following, they insured the freight of the said voyage by other policies, and with other underwriters, and valued the same at 4000*l.* The vessel with the goods on board in the course of the said voyage was captured by an *American* privateer: the owners thereupon gave notice of abandonment at the same time to the respective underwriters on ship and on freight, who severally accepted the same. The vessel was afterwards re-captured by one of his majesty's ships of war, was brought into *London*, and was, by decree of the high court of Admiralty, restored to the owners with the cargo, on payment of salvage and expences. The vessel arrived at *Liverpool*, delivered her cargo, and earned her freight. An agreement was entered into between the owners of the vessel and the underwriters on ship, but not by the underwriters on freight, that the Defendants (Plaintiffs in error,) should sell the vessel and receive the produce thereof, and should also receive the freight of the cargo for the use and benefit of all persons who should legally be entitled thereto respectively. The underwriters on ship and freight severally paid or satisfied the owners of the ship for a total loss of 100 per cent. on the valuation on both ship and freight. The Defendants received and paid to the underwriters on ship the amount produced by the sale of the vessel, which was about 33*l.* *per cent.* on their subscriptions. The underwriters on ship paid the loss on ship, before the underwriters on freight paid the loss on freight. The Defendants received the freight of the goods, which they hold under the terms of the agreement, and which is 35*l.* 16*s.* 5*d.* *per cent.*, clear, on the sum insured on the ship. The underwriters on ship, and also the underwriters on freight, severally claimed from the Defendants the freight so received. The

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plaintiff (Defendant in error) is an underwriter on ship to the amount of 200*l.*, and claims to recover, as such underwriter on ship, a proportion of the money so received by Defendants for freight.

The question for the opinion of the Court is, whether the Plaintiff (Defendant in error) is entitled to recover. If he be entitled, the verdict to stand; if not, a nonsuit to be entered.

The case was argued in *Easter* term, 56 *Geo.* 3., when the Court of K. B. gave judgment for the Defendant in error (*a*); but, by consent, it was ordered that the special case should be turned into a special verdict, for the purpose of obtaining the opinion of the Court of Exchequer Chamber upon a writ of error. This was accordingly done; and the special verdict was in substance the same with the special case. The case came on to be argued in *Trinity* term last, when,

For the Plaintiff in error, it was contended by *Littledale*, that as, in this country at least, freight might legally be the object of an insurance separate from the insurance on the ship, the law of this country would apply to insurance on freight, the same incidents, as it applied to any other species of insurance. If, therefore, by abandonment, the insurer on the ship became entitled to the ship, there was no reason why the insurer on freight should not by abandonment become entitled to the freight; nor could there be any difficulty in apportioning to each insurer that to which he was entitled. The insurer on ship ought not, by an abandonment, to gain more than the subject of his insurance, namely, the hull, tackle, and apparel of the ship. It would be unjust, if by the abandonment he were to acquire the freight, which had never been the object of his insurance. The difficulty

(*a*) 5 *M.* & *S.* 79.

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had arisen from supposing, that under an abandonment a ship passed precisely in the same manner as under a sale. Under the sale of a ship, if nothing was said to the contrary, the freight would pass: but the cases were in reality very different; for, in the case of a sale, and especially in the sale of a ship at sea, the freight about to be earned was part of the property for which the purchaser expressly paid his money: it was, in fact, the chief object of his contract; whereas, in the case of an abandonment, there being at the time of the abandonment no contract, no particular object of stipulation, the abandonee could only take that for the loss of which he had paid by his insurance. If, therefore, he had only paid for the loss of the body of the ship, why should he gain more by the result of an abandonment, and gain it to the loss of another insurer, who seemed to have the same claim to recover the object of his distinct insurance. Where the second insurer had such a separate claim, the abandoner could not transfer to the first any thing more than the thing insured. The underwriter on ship had no more right to complain that he was deprived of freight under such circumstances, than a purchaser excluded from it by express agreement. It must, however, be contended, that if the argument were correct, the owner of a ship who had not insured freight was, as well as an insurer on freight, entitled to the freight, after he had abandoned the ship to the insurer on ship; and this seemed to be the opinion of the Lord Chancellor, in *Mestaer* v. *Gillespie* (a). The question could only be argued on principle, as the cases were decided each on its own peculiar circumstances.

Scarlett, contrà. No distinction can be drawn between an assignment of the ship and an abandonment.

(a) 11 *Ves. jun.* 621.

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An abandonment, where the ship re-appears, is always followed up by a regular assignment: under an assignment, the freight passes to the assignee, *Chinnery* v. *Blackburne* (a), *Splidt* v. *Bowles* (b). It is as much incident to a ship as rent to a house; and this principle has been pushed to a rigorous extent. *Camden* v. *Anderson* (c), *Morrison* v. *Parsons* (d). Even where the ship is chartered, and the assignee cannot, by reason of a technical rule of law, sue in his own name, payment of the freight to him will be good. The law being such, it is no hardship on the insurer on freight; for every man who enters into a contract is supposed to know all the consequences of it; and the inconvenience of a different rule is very obvious. Suppose insurance of ship by one, and of freight by another: the ship is captured, and the owner abandons. If the insurer on ship obtains her by re-capture, is he bound to pursue the same voyage, in order that the insurer on freight may obtain the benefit of an abandonment of freight? And yet this and many such difficulties must occur, if it be once held that the right to freight does not in all cases follow the ship. But further, abandonment can only be of that which is material, tangible, and capable of being taken possession of by the abandonee. Right to freight is no more than right to the performance of a contract; a thing intangible, and existing in idea only, and, as a chose in action, not transferable by the law of *England*. It is clear, therefore, that the Plaintiff in error cannot support his claim on principle; and the cases are all against him. *Thompson* v. *Rowcroft* (e), *Leatham* v. *Terry* (f), *M'Carthy* v. *Abel* (g), *Sharp* v. *Gladstone* (h), *Splidt* v. *Bowles*.

(a) 1 *H. Bl.* 117.
(b) 10 *East*, 279.
(c) 5 *T. R.* 709.
(d) 2 *Taunt.* 407.
(e) 4 *East*, 34.
(f) 3 *B. & P.* 479.
(g) 5 *East*, 388.
(h) 7 *East*, 24.

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Littledale was then heard in reply. And now,

DALLAS C. J. delivered the judgment of the Court. — This case comes before the Court on error from the King's Bench; and it will not be necessary to state the facts in detail, as they will be found fully and accurately set forth in the printed report of what passed on the original hearing. It will be sufficient to observe, that there having been two separate insurances, the one on ship and the other on freight, and the ship having been captured in the course of the voyage, and re-captured, and having ultimately earned freight, and there having been an abandonment of ship to the underwriters on ship, and of freight to the underwriters on freight, the question arises, whether, upon such abandonments, the abandonment of ship includes freight, or whether the underwriters on freight are entitled thereto as having insured the freight specifically, and having from the assured an abandonment of such freight, under the insurance so made?

This question, long depending, but always avoided, because in former cases not necessary to be decided, has at last been determined by that Court, from whose judgment error is now brought, three of the learned Judges having been of opinion that an abandonment of ship included freight, and a different opinion having been declared by Mr. Justice *Bayley*, who considered that an abandonment of freight carried with it such freight, as a subject separate and distinct from ship, under and with reference to contracts of insurance.

It would be an idle parade and waste of time to go into the subject at large, fully treated of, as it is, in all the elementary works on insurance law; and more particularly as the printed report, to which I have already alluded, contains all, in point of authority and observation, that can properly belong to the question.

 I shall,

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I shall, therefore, merely advert to the general grounds on which the argument has proceeded, and on which the decision must now depend.

And, first, it is not denied that, generally speaking, an assignment of ship includes freight. But, it is said that it does so, because such is the natural effect and consequence of such assignment, and that there is no agreement between the parties to the contrary; whereas, in cases of abandonment under insurance, such agreement is to be implied from the practice of making separate insurances, which the law of this country (different, in this respect, from the law of other countries,) permits; and that the law will, therefore, keep the interest of the parties separate and distinct, giving to the underwriter on ship the ship abandoned, and the freight to the underwriter on freight.

That this practice has prevailed is undoubtedly true; but it is a fallacy to confound the fact of such practice with the legal effect of it, for it is the practice itself that raises the legal question. To make the practice decisive of the law, it would be necessary to go further, and to show a practice of settling losses, in conformity to the underwriters on ship having never claimed the freight, and the underwriters on freight having constantly received it. Such a practice, if of sufficient prevalence and notoriety to raise the presumption of general knowledge, would show the understanding of parties, with reference to which they must be taken to deal; and would therefore form the contract between those who were respectively privy to it. But it was admitted in the argument in the court below, adverted to from the bench, and has again been admitted in the argument here, that there has been no such practice; but that, on the contrary, the question has rested altogether hitherto in controversy, the underwriters on ship having, in every instance, resisted the claim of the underwriters on

 freight,

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freight, asserting the freight to belong to themselves as owners of the ship by the abandonment made. That there has been any actual agreement to the contrary, in this case, is not pretended; and it seems to follow of course, that from the mere practice of insuring separately, no such agreement can be implied when the practice stops with the fact of so insuring, and the effect of such fact has constantly been matter of dispute. And I have dwelt on this the more, because I observe, in the court below, the argument was mainly rested on the ground that such an agreement was to be implied, which I think it cannot be, for the reasons given.

There being, then, no actual or implied agreement between the two sets of insurers, what, in point of law, is the effect of the contract into which they have respectively entered? And, I say the two sets of insurers; because it is not necessary to consider the consequence of a separate insurance and abandonment of freight between the insurers on freight and the assured, under all circumstances that might possibly arise on the contract directly made between them. Confining, therefore, the consideration, in the manner stated, what is the legal operation of the respective contracts? And, in resolving this question, I put no stress upon the fact, that freight passes under a general assignment of ship; because, it appears to me that this is begging the question, the question arising on a supposed distinction resting upon abandonment as different from common transfer. The effect of it, correctly considered, is only to remit the question to the general operation of law, supposing the distinction contended for to fail. Nor do I place reliance on the assignee of the ship becoming the owner of her in a common case; for here, again, the question turns upon the asserted distinction. Neither do I give weight to the mere fact of separate insurances; for this, also, would be to take the point for granted;

 and

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and they are not separate, but connected, if made under a general understanding that each shall refer to, and be regulated by, the other.

But the case to me, seems to result to this; if, in every other case of transfer, the freight follows the assignment of the ship, and if abandonment be but a different term for assignment, and the same in effect, unless modified to a different purpose by the agreement of parties; and if, in this case, so far from there being any such agreement, either actual or in fact, or in law to be implied, the contrary is to be presumed (the case only amounting to claim on one side, and resistance to such claim on the other), the reason fails for taking this case out of the general law, and, consequently, the underwriters on ship, under the abandonment to them of ship, are entitled to freight.

And, in so deciding, we shall not break in upon the general legal principle, by engrafting upon it an anomaly of doubtful convenience; nor will the decision lead to any difficulty in future, as ship and freight may be made the subject of one and the same insurance; or, if there be any practical objection to this, of which I am not aware, the parties may contract with reference to the law as finally now settled, supposing the case to end here.

I will merely further state, that I have avoided going into much that has, on former occasions, been closely or loosely applied to the subject, having confined myself, for the reasons given, and which I will not repeat, to a single and general view of it.

In conclusion, I have only to add, that the judgment must be affirmed.

Judgment affirmed.

1820.

Nov. 27.

Lloyd, Assignee of Warwick, a Bankrupt, v. Heathcote.

1. An assessment for church and highway rates is a debt, and the assessor a creditor, under the bankrupt laws.

2. If a trader gives a general order to be denied to all comers, this is sufficient evidence of a beginning to keep house with intention to delay creditors.

3. A beginning to keep house with such intention, constitutes an act of bankruptcy, though no creditor is actually delayed.

THE Defendant, sheriff of the county of *Herts*, having executed a *fieri facias* on the goods of *Warwick*, was sued by the Plaintiff, in an action for money had and received; and the questions in the cause were, whether there had been a good petitioning creditor's debt against *Warwick*, and whether he had committed an act of bankruptcy; respecting which, the evidence before *Wood* B., at the last Summer *Hertfordshire* assizes, was to this effect: A servant heard the bankrupt order his wife to say to any who called, that he was not at home, although at that time he was in his own house. Shortly afterwards, the collector of the church and highway rates called for the sum assessed on the bankrupt. The bankrupt had retreated into the garden, and his wife told the collector her husband was not at home; upon which, the collector departed.

It was objected, at the trial, that the collector of church and highway rates was not a creditor, and that therefore, a denial to see him, did not amount to a keeping house with intent to delay creditors. The learned Judge having left it to the jury, to say, whether there was any debt due to the collector, and any denial, a verdict was found for the Plaintiff.

Lens Serjt. in the last term obtained a rule to set aside this verdict and have a new trial, when he contended, that the collector was not a creditor, because he could not have sued the bankrupt for the assessment which he came to collect; he had only a power to demand in the first instance, and in case the

money

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money were not paid, then to distrain under the statute (*a*); so that, at all events, as he was not entitled to take any step towards ensuring payment at the time he called, the money could not be said to be fully due, till the provisions of the statute had been complied with; and the case was the same as that of a demand made on a bill of exchange, the day of payment on which had not arrived: this circumstance distinguished the case from that of *Jeffs* v. *Smith* (*b*), where the debt being for king's taxes, the Attorney-General might have sued instantly, or the money have been levied by seizure, without any interval of ten days.

If the collector had no means of enforcing payment the day he called, he could not be deemed a creditor on that day; and then the denial of the bankrupt did not afford any evidence of a keeping house, with intent to delay a creditor, though it might be admitted, that if any such intention had been proved, the act of bankruptcy would have been clear.

Taddy Serjt. now showed cause against the rule; and the Court having intimated an opinion, that there appeared, on the part of *Warwick*, a sufficient *absenting* himself to constitute an act of bankruptcy, *Lens* endeavoured to distinguish the cases cited on that head; but, on its appearing that the evidence had not been sifted to that point at the trial, but only as to *Warwick*'s *keeping house* with intent to delay creditors, *Taddy*, on the latter head, argued first, that the assessment demanded by the collector was a debt due, for which the collector was clearly a creditor; that the statutes regarding bankrupts did not make any distinction between debts suable by action at law, and debts not so suable; that the directions appointed by act of parliament,

(*a*) 53 *Geo.* 3. *c.* 127. *s.* 7. (*b*) 2 *Taunt.* 401. 4 *Taunt.* 196.

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ment, to be pursued by the collector, for the recovery of sums due for rates, did not so affect the nature of those rates as to render them any thing other than a debt, from the moment of the assessment; and that, therefore, the case was not, in substance, distinguishable from that of *Jeffs* v. *Smith*. Secondly, admitting that the rates did not constitute a debt, that the collector was no creditor, and that, therefore, no creditor had been delayed on the occasion in question; still there was a keeping house, and a manifest intention to delay creditors, which two circumstances constituted an act of bankruptcy, even though no creditor had called, or had been, in fact, delayed; and for this he cited *Dudley* v. *Vaughan* (*a*), *Bayly* v. *Schofield* (*b*), *Robertson* v. *Liddell* (*c*).

Lens having spoken in support of his rule, the Court gave judgment.

DALLAS C. J. A denial to a creditor does not, of itself, constitute an act of bankruptcy, but is only evidence of a beginning to keep house, which, if accompanied with an intention to delay creditors, is indisputably an act of bankruptcy; and therefore it was properly admitted in argument, that if the denial had been given with any such intent, the keeping house would have amounted to an act of bankruptcy. The learned Judge, at the trial, stating the collector to be a creditor, the jury found, in effect, that such a beginning to keep house had taken place, and therefore the case is now reduced to this, whether the collector was a creditor: that is, whether he was in a situation to demand a debt. I shall confine myself to the point adverted to by the learned

(*a*) 1 *Campb.* 271.
(*b*) 1 *M. & S.* 338.
(*c*) 9 *East*, 487.

Judge

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Judge at the trial, although if it were necessary to recur to the other point, the Court might be inclined to hold, that, upon the evidence before them, there appeared, on the part of the bankrupt, a sufficient absenting himself to constitute an act of bankruptcy. But I avoid giving any determination on that point. In this case, then, the order to deny must have been, in effect, an order to deny to creditors, because the order is general, to deny to all persons; and if it were necessary, a case might be cited to that effect. Here, it is contended, there was no creditor, because the collector could not sue, by action, for his debt. But the argument contains a fallacy, when it assumes, that a debt cannot exist, unless where the debtor is suable in the ordinary way.

Here the debt is created by an assessment, and when that assessment is made, the debt is due and demandable. It seems to me, therefore, that, in this case, there was a debt due upon the assessment, — a denial, which could only have been made with a view to postpone the creditor's remedy, — and that the creditor's remedy was, in fact, postponed, (if it be deemed necessary to show that): because, if the collector believed what was told him, he would not recur to any remedies to which he might have resorted had he conceived the bankrupt to have been at home and denied. This, therefore, was a calling by a creditor, who came within the general order to deny: and even putting the case of this creditor aside, the general order to deny the bankrupt to all creditors, and the beginning to keep house, clearly amount to an act of bankruptcy.

PARK J. I am of the same opinion, and confining myself to one ground, think this was clearly a beginning to keep house. There is a great confusion in the text books on this point; it is continually laid down, that a denial to creditors is an act of bankruptcy. It is

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no such thing; it is only evidence of such an act, which may be evidenced in many ways. Lord *Ellenborough* has put the case of a man shutting himself up in his bed-room for a fortnight, and giving orders to be denied to all comers. That is a beginning to keep house, and an act of bankruptcy, though no one should call. Certainly a denial is usually relied on as evidence of the act of bankruptcy, *Garret* v. *Moule* (*a*), but it is as certainly, of itself, an equivocal act, and open to explanation; as where a man is denied only because he is attending upon a sick child, or engaged at dinner. Lord *Ellenborough* points to this in *Robertson* v. *Liddell*, and again, in *Dudley* v. *Vaughan*. Looking, then, at the real principle of the cases, which rests on a beginning to keep house with intent to delay creditors, the question comes to this,—was there evidence of such a beginning to keep house in the present instance? I think there was, and that, therefore, independently of the debt or remedy for it, this was an act of bankruptcy.

BURROUGH J. In *Garret* v. *Moule* I determined by an award, that, in order to complete an act of bankruptcy, the debtor must be actually denied to a creditor, with intent to defraud or hinder that creditor, and that keeping house with that intent was not alone sufficient; and so it was held by the Court, on motion to set aside the award. This doctrine was afterwards doubted; and it was held, that in reading the words of the statute, "to the intent *or* whereby," the word "*or*" should be construed as disjunctive; and that a beginning to keep house with intent to delay creditors was a sufficient act of bankruptcy, though no creditor was actually delayed. And this was so held, because such an act often rests only in the knowledge of

(*a*) 5 *T.R.* 575.

the

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the bankrupt and his family, and the creditor has no means of discovering it. The beginning to keep house is only put as an instance in the act, and there are various other ways in which a debtor may exhibit an intention to delay creditors, which would equally amount to an act of bankruptcy; as, by shutting himself up in a box, if it were done with intent to delay. As to the debt in this case, it is the duty of the inhabitants of a district to repair their roads; the poor contribute their labour, the rich their money; and though the rate on the rich is not exactly the same as a debt for goods sold, it is in the nature of a debt, and it is not material whether it is suable or no. If any remedy at all is given, the thing is just the same as if the debt were suable. The moment the assessment is made it becomes a debt; and that would suffice if it were necessary a creditor should have been actually delayed in this instance; but we need not go into that, because the keeping house is sufficient.

Rule discharged. (*a*)

(*a*) *Richardson* J. was absent.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Hilary Term

In the First and Second Year of the Reign of
GEORGE IV.

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BROWNE *v.* KNILL.

Jan. 26.

If, in covenant for non-repairing, the covenant contains an exception of "casualties by fire," it is fatal, on *non est factum*, if the covenant be stated in the declaration without such exception; and the Court will refuse to permit the Plaintiff to amend on paying the costs of the trial.

COVENANT on a lease for not repairing the premises. The covenant was stated in the declaration to be, that the Defendant "should and would at his the said Defendant's costs or charges, well and sufficiently repair, uphold, support, maintain, paint, cleanse, amend and keep the said messuage, or tenement and premises, with the appurtenances, and every part thereof, and the walls, privies, drains, and cess-pools thereto belonging,

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longing, in by and with all needful and necessary repairs, cleansings and amendments whatsoever, when, where, and so often as occasion should require." Plea *non est factum*. The lease produced in evidence contained the words above set forth, with the addition of the following qualification, "casualties by fire excepted." At the trial before *Dallas* C. J., it was objected for the Defendant, that this variance was fatal, and *Dallas* C. J. nonsuited the Plaintiff, citing the case of *Tempany* v. *Burnand* (a), as expressly in point.

Vaughan Serjt. now moved to set aside this nonsuit, and have a new trial, urging that the qualification of the covenant need not be stated in pleading, unless it constituted a condition precedent; it was sufficient if the Plaintiff disclosed enough to entitle him to recover. If the qualification constituted a condition subsequent, as it did here, it might be pleaded as matter of defence, but could not be taken advantage of on *non est factum*. He cited *Gordon* v. *Gordon* (b), as over-ruling *Tempany* v. *Burnand*, and *Elliott* v. *Blake* (c), as in point, as also *Com. Dig.* tit. *Pleader*, C. 57. adding, that in actions against a carrier, it was never usual to state the limitation of their liability to 5*l.*, where the goods are not stated to be of greater value.

Sed per Curiam. You are bound to set out the covenant truly: the distinction is, whether the qualification forms part of the covenant or not: If it forms part of the covenant, it must be set out, if not, it may be omitted; here it is part of the covenant which you state to

(a) 4 *Campb.* 20.
(b) 1 *Starkie N. P. C.* 294.
(c) 1 *Lev.* 88.

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be an absolute covenant whereas it turns out to be qualified.

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Rule refused.

Vaughan then prayed to be allowed to amend on paying the costs of the trial, and cited *Halhead* v. *Abrahams* (*a*), but the Court refused this; *Park* J. asking, why the Defendant was to be deprived of the benefit to which he had become entitled by the Plaintiff's *laches?*

Vaughan took nothing by his motion.

(*a*) 3 *Taunt.* 81.

TOMLINSON and Another *v.* JOHN WILKES, Esq.

Jan. 27.

An assignee of a bankrupt who has released his individual claims on the bankrupt's estate, is an admissible witness to prove the petitioning creditor's debt.

THIS was an action against the Defendant, as sheriff of *Essex*, for a false return to a writ of *fieri facias*, issued by the Plaintiffs on the 3d *May*, 1819, against the effects of *James Shynn*. At the trial of the cause before *Wood* B. at the last *Chelmsford* Summer assizes, the defence set up on the part of the sheriff was, that an act of bankruptcy had been committed by *Shynn* before the 3d *May*. In order to prove the petitioning creditor's debt, *J. A. Bygrave*, a creditor of *Shynn*, and one of the assignees under the commission, was called, and his competency being objected to by the counsel for the Plaintiff, on the ground, that he was an assignee and interested, a release of the witness's individual claims on the estate of the bankrupt was put in. *Wood* B. held that this release made the witness competent; for that, as assignee of *Shynn*'s estate, he was not

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interested. The learned Judge, however, saved the point. The jury found a verdict for the Defendant.

Taddy Serjt. in the last term, having obtained a rule *nisi* to set aside this verdict and have a new trial, on the ground, that the witness *Bygrave*, whose evidence established the petitioning creditor's debt, was an interested witness,

Pell Serjt. now shewed cause, and contended that *Bygrave*, having released his individual claims, stood in the situation of a mere trustee, and that no interest could possibly arise to him from the event of the cause.

Taddy, in support of his rule, urged that the sheriff here was a stakeholder, and that if he refused to deliver the proceeds of the levy, the verdict, in this case, might be given in evidence in an action against him by the assignees for retaining the same, which brought the case within the principle of the carrier's case. (*a*)

Sed per Curiam. The witness, having released his claims as a creditor on the estate of the bankrupt, stood in the situation of a mere trustee whose trust was coupled with no personal interest: he was, therefore, an admissible witness. An executor, though he has duties to perform, is an admissible witness, *Phipps* v. *Pitcher* (*b*); *Goodtitle* v. *Welford* (*c*); and the case in *Buller's Nisi Prius* has no application.

Rule discharged.

(*a*) 1 *Bull. N.P.* 243.
(*b*) 6 *Taunt.* 220.
(*c*) *Doug.* 134.

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PEAKE *v.* CARRINGTON.

Jan. 27.

In an action against the master of a ship for penalties under the 34th section of the *pilot* act, the declaration must allege that the unlicensed pilot *offered to the master* to take charge of the ship; or, that such pilot *offered* to take such charge *in the presence of the master*; and it is not sufficient merely to follow the words of the section.

THIS was a *qui tam* action on the pilot act (*a*), by the 34th section of which it is enacted, that "every master of any ship or vessel, who shall continue to act himself as a pilot, or who shall continue any unlicensed person, or any licensed person, acting out of the limits for which he is qualified as a pilot, after any pilot licensed to act within the limits in which such ship or vessel shall then actually be shall have offered to take charge of the ship or vessel; and every person assuming or continuing in the charge or conduct of any ship or vessel, without being duly licensed to act within the limits in which such ship or vessel shall actually be, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel; shall respectively forfeit, for every such offence, a sum not exceeding fifty pounds, nor less than ten pounds." Plea, *nil debet*. At the trial, before *Abbott* C. J., (*Maidstone* Summer assizes, 1820), a verdict was found for the Plaintiff, on the last count of the declaration, which stated, that "heretofore, &c., the Defendant, being the master of a certain ship or vessel called *The General Murray*, did continue a certain unlicensed person, to wit, one *William White*, that is to say, did continue him in the pilotage of the said last-mentioned ship or vessel, to wit, from *Margate Roads* aforesaid to *Gravesend* aforesaid, after a pilot licensed to act within the limits in which the said last-mentioned ship or vessel then actually was, to wit, one *Edmund Gibbs*, had offered to take charge of the said last-mentioned ship or vessel, con-

(*a*) 52 *G.* 3. *c.* 39.

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trary to the form of the statute in such case made and provided, whereby, and by force of the said statute, the said Defendant had forfeited, for his last-mentioned offence, another large sum of money, to wit, &c.; and thereby, &c."

Bosanquet Serjt., in the last term, had obtained a rule *nisi* to stay judgment in this case, on the ground, (among others) that the count in question contained nothing to connect the Defendant with the supposed offence, there being (though the words of the act had been pursued) no allegation when or how the pilot offered, whether in the voyage stated, or in any other voyage; neither did it appear by the count, that the offer was ever made to the master, who was sought to be fixed with the penalty, or even within his hearing.

Taddy Serjt. now shewed cause against the rule. The Plaintiff, in his declaration, has followed the very words of the act, which is all that he can be required to do. [*Richardson* J. There are many cases arising on acts of parliament, in which something more than the general words of the act is necessary. In *Etherington*'s case (*a*), (which was tried in *Sussex*, under a special commission) in an indictment for stealing in a dwelling-house, persons being therein, it was stated that the prisoners, one watch, &c. (and other articles above the value of 40 shillings) of the goods and chattels of the persons then being in the dwelling-house, and *being put in fear*, feloniously did steal, &c. It was moved, in arrest of judgment, that the prisoners were entitled to their clergy, on account of the defect as to the capital part of the charge, because it did not appear, with sufficient cer-

(*a*) 2 *Leach.* 670. *S.C.* 2 *East P.C.* 635. See stat. 23 *Hen.* 8. *c.* 1. *s.* 3. 1 *Edw.* 6. *c.* 12. *s.* 10. and 3 *W.* & *M. c.* 9. *s.* 1.

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tainty upon the record, that the persons alleged to be in the house were put in fear *by the prisoners*. And the Judges finally agreed, that the prisoners were entitled to their clergy, though they at first inclined to think the indictment good, from its pursuing the words of the stat. 3 *W. & M.* *Burrough* J. In *The King* v. *M'Gregor* (*a*), it was held insufficient, in an indictment on the 39 *Geo.* 3. *c.* 85., against a servant for embezzling money received on his master's account, to follow the words of the statute, and it was ruled, that there must be a positive allegation that the money was the property of the master, as in other cases of larceny.] It being stated that there was an offer, and that the Defendant "did continue the unlicensed person," an acceptance of the offer by the Defendant, and, consequently, the proposal to him must, necessarily, be inferred. [*Park* J., The master might have been on shore, and the offer might have been made in his absence.] In *The King* v. *Fuller* (*a*), it was held sufficient, in an indictment on 37 *Geo.* 3. *c.* 70., to follow the words of the act, and to state, that the prisoner did maliciously *endeavour* to seduce *M. L.*, he *M. L.* being a person serving his majesty; without averring that the prisoner knew *M. L.* to be a soldier.

Bosanquet, in support of his rule. *The King* v. *Fuller* does not apply; for, there, the person charged was stated to have done the whole of the act; the Defendant here is not shown to have done any thing penal; and he cannot be charged with a penalty, till it is shown he had knowledge of the fact that the person employed was unlicensed.

DALLAS C. J. The count of the declaration, on which the verdict in this case is taken, does not state the time

(*b*) 3 *B. & P.* 106. (*b*) 1 *B. & P.* 180.

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when the supposed offence was committed, nor that the offer was made to the master, who is sought to be charged with the penalties of the act; nor does it state to whom the offer was made. It does not appear by whom the unlicensed person was put in charge of the ship; and *non constat*, but that he was so put in charge by a mere stranger. Why should it not have been averred, that the offer was made to the master, so as to bring him within the purview of the act? It is undoubtedly insufficient, in many cases, to set out on the record the mere words of a penal act, without going further, and stating circumstances to connect the Defendant with the alleged illegal transaction.

PARK J. of the same opinion.

BURROUGH J. I am of opinion, that this count is insufficient to fix the Defendant with the penalty. There is nothing which connects the Defendant with the alleged offence, but his having continued to employ an unlicensed person, which he might have done, without knowing that such person was unlicensed; as to the case of *The King* v. *Fuller*, the words "feloniously, maliciously, and advisedly," in that case, sufficiently connected the prisoner with the illegal transaction, and fixed him with the knowledge that *M. L.*, whom he endeavoured to seduce, was a soldier.

RICHARDSON J. I think that, in order to bring a Defendant within the purview of this statute, it must appear, that the offer of the pilot was made to the Defendant, or in his presence. A man is not to be fixed with a penalty for an act, which, for any thing that appears, may have been done in his absence.

Rule absolute.

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CHAD, Bart. *v.* TILSED.

Feb. 1.

A grant of wreck was made by *Hen.* 2. to the proprietors of certain lands on the coast, and confirmed by *Hen.* 8. The proprietors of those lands having, 40 years ago, with a view to reclaim sea mud, run an embankment across a small bay, which was used to be left almost dry at low water, and having ever since asserted, without opposition, an exclusive right to the soil of the bay, though the bank was forced by tempest: Held, that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, and to establish the right so asserted.

TRESPASS *quare clausum fregit.* Pleas, first, general issue; second, leave and licence; third, that the *locus in quo* was part of *Poole* harbour; fourth, that the *locus in quo* was an arm of the sea, and that the Defendant entered there to fish, as he lawfully might. The replication traversed these pleas: the rejoinder took issue on the replication. At the trial before *Graham* B., *Dorchester* Summer assizes, 1820, the Plaintiff, who was proprietor of *Brownsea*, an island of about 1000 acres, lying within the ambit of *Poole* harbour, deduced title to the island, including the *locus in quo*, from the *Sturt* family and the abbot of *Cerne.* A grant of wreck from *Henry* the Second, in the first year of his reign, 1154, to the abbot of *Cerne*, confirmed by *inspeximus* in the first year of *Henry* the Eighth, was proved; also, a grant from *Henry* the Eighth, in the 36th year of his reign, to the Earl of *Oxford*, of the island of *Brownsea*, and a grant of the same year from the Earl of *Oxford* to *Richard Duke* of the same island, with wreck of the sea. At one extremity of the island is a bay of about 60 acres, called *St. Andrew's Bay*, which, at low water, becomes a great expanse of uncovered mud, intersected by a small inlet or gully only a few feet wide, called, in the language of the country, a lake. In this lake there is about three or four feet water at low tide, and about the same depth over the adjacent mud at high tide. About forty years ago, Mr. *Sturt*, at a great expense, constructed an embankment all across the chord of *St. Andrew's Bay*, with a view to reclaim the mud and bring it into cultivation, and frequently made use of the sea-weed, and mud and gravel, which was within the bank. The bay is about a mile and a half from *Poole*, in full

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view of the town; and no opposition was ever made to Mr. *Sturt*'s undertaking. The bank was afterwards forced by a storm, and the sea again entered the space within, at high tide. Mr. *Sturt*, however, always treated it as his exclusive property; and no fisherman or other person was permitted to remain in the gully or lake, until Mr. *Sturt*'s consent had been obtained. Repeated assertion of property, on his part, was proved; and uniform acquiescence therein, as also collection of wreck in *St. Andrew's Bay*, and application of it to his own use. It was admitted that *St. Andrew's Bay* formed no part of the harbour of *Poole*, and that vessels of any burthen could never float there.

The case on the part of the Defendant, who had insisted on fishing in the take or gully within the artificial embankment, consisted of two grants of the *locus in quo*: the first to the Duke of *Richmond*, for 31 years, in the 13th year of *Charles* the Second; the second to *Robert Gifford*, for 41 years, in the 17th year of the same reign, (wherein the spot in question was described as waste land, and ooze and ooze lands, the grantee having covenanted to endeavour to reclaim and bring it into cultivation within seven years,) and of an attempt to prove that the *locus in quo* had, previously to Mr. *Sturt*'s time, been commonly fished on; as also afterwards, in defiance of his assertion of property. This, however, was not satisfactorily established; and it appearing that nothing had ever been done under the grants of *Charles* the Second, the jury, without allowing the learned Baron to conclude his summing up, found a verdict for the Plaintiff.

Lens Serjt., in the last term had obtained a rule *nisi* for a new trial, chiefly on the ground that the soil between high and low water-mark was vested in the crown, and so open to the public, and that a mere grant of

of wreck did not convey any right to the soil: that the grants in the time of *Charles* the Second were utterly inconsistent with any such supposed right in the owners of *Brownsea*; for, if the soil of *St. Andrew's Bay* had belonged to them, the crown never would have granted it to the Earl of *Oxford*: that, even if the grant of wreck could give any right to the soil of the shore, by the "shore" must be understood a certain space following the arc of the bay, upon which, indeed, a vessel might be wrecked, and not the soil of the centre of the bay, where, at high tides, vessels could not easily be lost: that if the law were thus, Mr. *Sturt*'s acts were only acts of usurpation; and usage of forty years, founded on usurpation, could not confer a right. It was urged, also, that perhaps the corporation of *Poole* might have been in confederacy with Mr. *Sturt*, and that such a contrivance ought not to deprive the fishermen of their right to fish over the *locus in quo*. He cited *Vooght* v. *Winch*. (a)

Pell, Serjt., *contrà*, insisted that what Mr. *Sturt* had done forty years ago, openly and unopposed, together with his subsequent assertion of property so uniformly acquiesced in, though not of themselves constituting any right, were evidence from whence anterior usage and anterior assertion of right might be presumed; that such anterior usage must be so ancient as to afford the best interpretation of the nature of the original grant; and that a prescription of such antiquity, coupled with the general grant, was quite conclusive as to the Plaintiff's right.

Lens having been heard in support of his rule, the Court now gave judgment.

(a) 2 *B.* & *A.* 662.

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DALLAS C. J. I agree that cases of this sort may rest on one or both of the two following grounds, that is to say, on grant, or on usage which presupposes a grant: I agree also, that in the case of a grant, no usage, however long, can countervail the clear words of the instrument, for what is done under usurpation cannot constitute a legal usage: but, it is equally clear, that when a grant of remote antiquity contains general words, the best exposition of such a grant is long usage under it. Unless, therefore, the usage of forty years ago can be proved to have originated in usurpation, it is evidence, whence usage anterior to that time may be presumed: and such a length of modern usage, connected with the ancient usage, affords the strongest exposition of the meaning of the original grant. The rule laid down in a book of authority on this subject is, "If the language of an ancient grant be obscure or doubtful, constant usage may be resorted to, to expound, though not to control the deed;" and the uniform course of modern authorities shews, that however general the grant, usage may afford a true construction of it, reducing this question to a question of fact, namely, what was the usage here? I agree that if the usage be only of forty years' duration, and be applied to establish an exclusive right over an arm of the sea, this could not destroy the right of the subject, but we must look to the way in which this modern usage arose, and that is as strong as possible to establish the Plaintiff's claim; his predecessor raises a bank in the face of the whole town of *Poole*, and, according to the pleas, in a place which was part of the harbour in which all the inhabitants of the town had an interest. This was done at considerable expense, and occupied a great length of time. After the bank had been broken down, there was no interruption of the Plaintiff's assertion of his claim: permission to enter within the bank was constantly asked, and given or

refused

refused as to the proprietor seemed fit. The usage was as strong as it possibly could be under such circumstances. But it was asked, — if the corporation of *Poole* had been in confederacy with the then proprietor of the island, and did not choose to sue upon this usurpation, should a poor fisherman by such means be deprived of his right? Certainly not. However, if so general a right had existed, it may be presumed any usurpation on that right would have been resisted. And why are we to presume any such confederacy between the owner of the island and the corporation of *Poole?* I have said, that where the words of a grant are general, they must be explained by usage. The grant of *Henry* the Second, conveys the island of *Brownsea*, and its shores; What then are its shores? — what usage has pointed out. And if I find the usage such as existed here, how can I resist the evidence? It is urged, that this is only a grant of wreck, but wreck must rest on the soil, usage must determine what has been deemed soil, and vessels of burthen could at no time float over the mud in question. The lakes which have been mentioned, were only such small inlets as every where intersect the shore. The grants of *Charles* the Second confirm this usage, inasmuch as those grants were never acted on or acquiesced in by the owner of the island. I think, therefore, the question has been properly disposed of, and that a new trial cannot be granted.

PARK J. If the grants in question contained any thing inconsistent with the usage established, the case might be different, but, the grant consisting of general words, we are driven to enquire what has been the usage under it. That is all one way, and it is reasonable to suppose it was the same in ancient times as at present. Nothing in the present decision will conflict with that of *Vooght* v. *Winch*, which only decided that, in a public naviga-ble

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ble river, twenty years' possession of the water at a given level is not conclusive as to the right.

BURROUGH J. The verdict in this case is not contrary to the legal effect of the evidence, but serves to confirm the construction put on the grants. The first contains a grant of wreck to the abbey of *Cerne*, throughout all their lands upon the sea, which shews they had other lands besides the main-land of *Brownsea;* now what could these other lands be but the land in question? As to the grants produced by the Defendant, deeds produced by a party avail him nothing, unless the possession has gone consistently with them: Here, the parties who received the first grant from *Charles* the Second, did nothing under it; then other adventurers came forward, who also failed to make any attempt conformable to their grant. For what reason did both these parties, who thought it beneficial to take the grant, abstain from acting under it, but because they found a person in possession under a former grant? Then, the assertions of right on the part of the Plaintiff are strong beyond all measure; and though the erection of the bank forty years ago would not of itself confer a title, yet, from such erection unopposed and the subsequent uniform usage, prior usage to the same effect may be presumed, which, coupled with the general terms of the grant, establish the Plaintiff's claim beyond dispute.

RICHARDSON J. The evidence of assertion of right on the part of the Plaintiff and those under whom he claims is indeed abundantly strong; however, I should agree that the legal effect of this evidence would not invest him with a title, and that the whole might amount to nothing more than usurpation, if it were quite clear that, prior to the construction of the embankment forty years ago, the public had any right over the *locus in quo*.

But

But in this case as in every other, modern usage of forty years' duration is evidence not only for that period, but evidence from which it may be presumed, that the same course was pursued in earlier times, if nothing is shewn to the contrary. Here there was evidence that the usage had been the same almost time out of mind; that the land in question was *littus maris*, not indeed so dry as *terra firma*, but still shore of the sea, and not covered at low water, with the exception of a small lake or inlet: the place, therefore, falls within the description of land, about which there can be no doubt as to the law, that an individual may claim a right in it, either by grant or by usage independently of grant. Most of the evidences, which *Hale* (*a*) enumerates as denoting such a right exist here "constant and usual fetching gravel and sea-weed and sea-sand, between the high water and low water mark, and licensing others so to do; inclosing and imbanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand." The grants of *Charles* the Second call the spot in question ooze land, and, therefore, are evidence to shew that, even in those days, the place was considered as between high and low water mark; and, as nothing was done under them, they rather make against the Defendant than for him, as it should thereby seem that, when the grantees came to act under their grant, they found an obstacle in an earlier and better title.

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(*a*) *De Jure Maris, pars* 1. *c.* 6. *p.* 27.

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Feb. 6.

CHARLES CHRISTIE, GEORGE ALEXANDER WYLIE, and WILLIAM ATKINSON, Assignees of the Estate and Effects of GEORGE LAING, a Bankrupt, *v.* LEWIS LEWIS.

By charter-party between Defendant, owner of a ship, and *G. L.* Defendant granted and to freight let, and *G. L.* took and to freight hired the ship for the voyage. Defendant covenanted that the master should receive on board at *London*, goods to be sent alongside by *G. L.*, and deliver them from alongside at *Newfoundland*, according to bills of lading, there receive, and deliver at *Demerara* other goods, in like manner; and there, in like manner, receive other goods, and deliver them in the *London* docks, according to bills of lading; and that the ship's boats should assist in loading and unloading, so as the exclusive duties and operations of the ship should not be thereby impeded. In consideration whereof *G. L.* covenanted to send and take from alongside goods, and to pay for the freight and hire of the ship for the voyage 2600*l.*, with primage, &c., one quarter part thereof on delivery of goods at *Newfoundland*, by good bills at 60 days' sight on *London*, and the remainder by good bills at two months' date from the day of the ship's report inwards at the port of *London*. The voyage was performed, and goods of third persons brought from *Demerara* under bills of lading, deliverable to the consignees on payment of certain specified freights therein mentioned, which freights the Defendant received, no bill for the three quarters freight per charter-party having been given or tendered to him, and a bill for one quarter given at *Newfoundland* having been dishonoured: Held, (*Dallas* C. J. *dissentiente*,) first, that, notwithstanding the words of grant, taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; and that, as the freight per charter-party was to be paid to him by good bills, prior to the delivery of the homeward cargo, he had a lien thereon for such freight: secondly, that he had a right to receive the freight per bills of lading from the consignees, and had a like lien on such freight when so received.

ASSUMPSIT for money had and received by the Defendant for the use of *George Laing*, before he became a bankrupt, and also for money had and received by the Defendant, to the use of the Plaintiffs as assignees of the estate and effects of the said *George Laing*, after his bankruptcy. The declaration contained the other usual money counts, with an account stated. The Defendant pleaded the general issue. At the trial of the cause before *Gibbs* C. J. (*London* Sittings after *Trinity* term 1817,) a verdict was found for the Plaintiffs, with 1981*l.* 16*s.* 9*d.* damages, subject to a refer-

ence as to the amount, and to the opinion of the Court upon a case which was, in substance, as follows:

The Defendant on the 2nd *February* 1815, and from thence continually until the 1st *April* 1816, was sole owner of the ship *Ann* belonging to the port of *London*. On the 2nd *February* 1815, the Defendant as such owner, and *George Laing* the bankrupt, entered into a charter-party, under seal, by which the Defendant for himself, his heirs, executors, and administrators, granted and to freight let, and *George Laing* for himself, his executors, administrators and assigns, hired and to freight took the ship *Ann*, for the voyage, upon the terms and conditions, and for the considerations following: *Imprimis*, the Defendant covenanted, that the vessel being tight, staunch, and substantial, well manned, tackled, apparelled, and furnished as is usual for vessels in the merchants' service, and for the voyage thereinafter mentioned, the master *William Wilson*, or some other proper person, should receive and properly stow on board the said vessel, all such lawful goods, wares, and merchandises, as the said freighter or his assigns might think proper to send alongside her in the port of *London*, not exceeding, in the whole, what she could safely stow and carry, over and above her stores, tackle, apparel, and provisions; and, having received the same on board, and being dispatched, the master should immediately (wind and weather permitting) set sail, and proceed in and with the vessel from the port of *London*, and proceed to *Portsmouth*, there to join and sail with the first convoy appointed for *Newfoundland*, and, being arrived at *St. John's* in *Newfoundland*, should make a right and true delivery of the cargo from alongside, to the agents or assigns of the said freighter, according to the bills of lading signed in *London*; such cargo being discharged, and the vessel ren-

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rendered tight, staunch, and substantial, well manned, and furnished in the manner aforesaid, the master should receive, and properly stow on board, from the agents or assigns of the said freighter, all such lawful goods as he or they might send alongside, in craft (provided at the costs and expences of the said freighter, his heirs or assigns) not exceeding, in the whole, what she could safely stow and carry, over and above her stores, tackle, apparel, and provisions; and having so completed her loading in *St. John's*, and being dispatched, should immediately (wind and weather permitting) set sail, and proceed from thence, with or without convoy, to *Demerara*; and having arrived there, should make a right and true delivery of the cargo from alongside to the agents or assigns of the said freighter, the conveyance to the shore to be at his or their expence; and having discharged the same, according to the bills of lading signed at *Newfoundland*, and the vessel being in readiness, after the maner aforesaid, for the further continuation of the voyage, the master should take, receive, and properly stow on board the said vessel, all such legal goods as the agents or assigns of the said freighter should send alongside of her, not exceeding as aforesaid; the conveyance of such goods from the shore to the ship to be at the expence of him the said freighter, his agents or assigns; and, being so loaded and dispatched, should immediately (wind and weather permitting) set sail, and proceed from *Demerara* for the port of *London*, and, on arrival at the *West India* dock there, make a right and true delivery of such her homeward cargo, agreeable to bills of lading, and then end the intended voyage (the act of God, the king's enemies, fire, the dangers and accidents of the seas, rivers, and navigation, of whatsoever nature and kind, always in all cases excepted.) And the owner agreed, that assistance should be given with the ship's boats,

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properly manned for the purpose, in unloading and loading the cargoes, at the respective ports above mentioned, at all times, when required by the freighter, his agents or assigns; but it was understood, that no impediment was thereby to be made, in carrying on the exclusive operations or duties of the ship; and the owner further covenanted with the said freighter, that he should be allowed, in the whole, 100 running days for loading the vessel in the River *Thames*, for unloading and loading her in *St. John's*, and for unloading and loading her in *Demerara*; provided that the vessel should not be delayed at *St. John's*, *Newfoundland*, for the purpose of loading and unloading, more than 25 running days in the whole; but it was fully agreed on by the said parties, that the vessel should be loaded at *Demerara*, and dispatched in time for her to sail, and depart from thence for the port of *London*, on or before the 1st day of *August*, then next ensuing. In consideration whereof, *George Laing*, for himself, his heirs, executors, and administrators, covenanted with the Defendant, his executors, administrators, and assigns, that he the said freighter, his agents or assigns, should send, or cause the several cargoes above referred to to be sent alongside the vessel, and also take from alongside the vessel, at the respective ports of loading and unloading above mentioned, free of expense, in providing craft or other conveyance for that purpose, to the owner of the vessel as aforesaid, the boats of the ship properly manned, assisting in such unloading and loading of said cargoes, at all times when required, but not to the impediment of carrying on the exclusive operations or duties of the ship, conditioned and agreed to on the part of the owner, as above, and that within the time before limited, or days of demurrage thereinafter mentioned. And further, that the said freighter, his executors, administrators, or assigns,

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should well and truly pay or cause to be paid unto the said owner, his heirs, executors, administrators, or assigns, in full, *for freight and hire* of the vessel for such voyage, the sum of 2600*l.*, together with 5*l. per cent.* primage thereon, and, in addition to the freight and primage, two-thirds of all dock-dues, port and pilotage charges incurred during the whole of the voyage; the said freight, &c. was to be paid as follows (*viz.*) one quarter part thereof on a right and true delivery of the cargo at *Newfoundland*, by a good bill or bills on *London*, at 60 days' sight, and the remainder thereof by a good bill or bills, at two months' date from the day of the ship's report inward in the port of *London*; and the freighter, for himself, his executors and administrators, covenanted with the owner, his executors, administrators, and assigns, to make all necessary disbursements and advances, both at *Newfoundland* and at *Demerara*, in and about the concerns of the ship, all which advances were to be deducted from the last payment of the freight, provided that it should be lawful for the said freighter, his agents or assigns, to detain the ship, on demurrage, at the ports of loading or unloading aforesaid, any or either of them, any time or term not exceeding 20 days, on paying the owner of the vessel, or his order, ten pounds demurrage money *per* day, day by day, as the same should become due. And for the true performance of all and singular the covenants, clauses, provisoes, and agreements therein contained, the parties respectively thereby bound and obliged himself and themselves, his and their several and respective heirs, executors, and administrators: the Defendant especially bound his vessel, her freight and appurtenances, and the said *George Laing*, the cargoes to be laden on board of her, unto the others and other of them, and to the executors and administrators of the others and other of them, mutually and reciprocally, in the penal sum of 5000*l.*

After

After the execution of the charter-party, a cargo of goods was shipped by *George Laing*, and divers other merchants, in pursuance of arrangements made between them and *George Laing*, on board the vessel in the River *Thames*; and *William Wilson*, the master, at the request of *George Laing*, signed bills of lading, for the goods deliverable to the several consignees thereof, at the port of *St. John's*, in the island of *Newfoundland*, according to the form of the bill of lading next herein-after set forth; the freight of such of the goods as were not shipped by *George Laing*, was paid by the shippers to *George Laing*, in *London*, at the time the bills of lading were signed. The goods shipped by *George Laing* were consigned by him to *Hart* and *Robinson*, of *Newfoundland*, for sale, on his account. — "Shipped, &c., in good order and well conditioned, by *George* and *James Brown*, in and upon the good ship called *Ann*, whereof is master, &c., for this present voyage, *William Wilson*, and now riding at anchor in the river *Thames*, and bound to *St. John's*, *Newfoundland*, to say, 10 barrels pitch, &c. &c. being marked and numbered as in the margin, and are to be delivered in the like good order, and well conditioned, at the aforesaid port of *St. John's*, *Newfoundland*, the act of God, the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, navigation of whatever nature and kind soever excepted, unto Messrs. *Hutton*, *M'Lea* and Co., or to their assigns, freight for the said goods being paid in *London*, with primage and average accustomed. In witness whereof, the said master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which three bills being accomplished, the other two to stand void. And so, &c. Dated in *London*, 7th *March*, 1815, quality and contents unknown to *William Wilson*."

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The *Ann* sailed from the river *Thames* on the 16th *March*, 1815, on the voyage mentioned in the charter-party, arrived at *St. John's* on the 12th *May*, 1815, and delivered her cargo, pursuant to the said bills of lading, signed by the master. *James Laing*, a brother of the bankrupt, sailed in the vessel to *St. John's*, as supercargo of *George Laing*, and acted as such for the voyage. After the delivery of the cargo at *St. John's*, the master applied to *James Laing*, for a bill or bills of exchange for 650*l.*, as for one quarter of the freight, agreeably to the stipulations contained in the charter-party; and *James Laing* accordingly drew two bills of exchange for 350*l.* and 300*l.*, upon *George Laing*, payable 60 days after sight, to the order of the Defendant, and delivered them to the master. These bills were remitted by the master to the Defendant, and were duly accepted by *George Laing*. They fell due on the 26th *August*, 1815, were dishonored by the bankrupt, and have not since been paid. After the discharge of the cargo, Messrs. *Hart* and *Robinson*, of *St. John's*, by the order and on the account of *George Laing*, purchased and shipped a cargo of cod-fish on board the *Ann*, for *Demerara*, and the master signed a bill of lading for the delivery of the cargo of fish to *James Laing*, at *Demerara*. The vessel, on the 6th *June*, 1815, proceeded from *St. John's*, with *James Laing* on board, on her voyage to *Demerara*, where she arrived on the 3d *August*, 1815. After the vessel had discharged her cargo at *Demerara*, *James Laing* engaged Messrs. *M'Garrel* and Co., at that place, to procure a homeward freight, and various goods were, through their assistance, shipped on board the *Ann*, at *Demerara*, by different merchants, for which goods the master of the ship signed bills of lading, in the following form. "Shipped, in good order and condition, by *John M'Garrel*, in and upon the good ship called the *Ann*, whereof *William*

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Wilson is master, for the present voyage, now lying in *Demerara* river, and bound for *London*, 20 hhds. sugar, being marked and numbered as in the margin, and are to be delivered in the like good order and condition, at the aforesaid port of *London*, (all and every the dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever excepted) unto Messrs. *Underwood*, *Hall*, and Co., or to their assigns, he or they paying freight for the said goods nine shillings sterling *per cent.* In witness whereof, the said master or purser of the said ship hath subscribed to four bills of lading, all of this tenor and date, one of which being accomplished, the rest to stand void. Dated in *Demerara*, 9th *November*, 1815. *William Wilson*. Quality and contents unknown." On the 3d *December*, 1815, the vessel set sail from *Demerara* on her homeward voyage; and having arrived in the port of *London*, was reported in the custom-house on the 26th of *February*, 1816, and on the same day entered the *West India* docks for the purpose of discharging her cargo. *James Laing* remained at *Demerara*, and afterwards came home by the packet. On the 23d *February*, 1816, a commission of bankrupt was issued against *George Laing*, under which he was found and declared a bankrupt, upon acts of bankruptcy committed by him on the 12th, 13th, and 14th of *February*, 1816. The Plaintiffs were duly chosen assignees of his estate and effects, and an assignment thereof was made to them by the major part of the commissioners named in the commission, by indenture dated the 19th *March*, 1816. On the day of the report of the *Ann* at the custom-house in *London*, a copy of the manifest of the cargo of the *Ann* brought from *Demerara*, with a notice to the directors of the *West India* docks not to deliver any of the goods without the order of Messrs. *Harrison*

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and *Betts*, was delivered to the directors of the *West India* dock company by the master, by the direction of the Defendant or his agents. No sum or sums of money, nor any bill or bills of exchange, were ever demanded by the Defendant, or tendered or offered by the bankrupt, or by the Plaintiffs, or by any other person to the Defendant, for the sum of 2600*l.*, in the charter-party mentioned; or of any part thereof, either upon the report of the *Ann* inwards, or at any time before or since.

William Wilson and the crew of the *Ann* were, upon the voyage mentioned in the charter-party, and agreeably to the terms thereof, hired and employed to navigate the vessel; and the vessel was during the voyage navigated, with the exception of the port and pilotage charges and dock dues, mentioned in the charter-party, at the Defendant's expence. The goods brought by the *Ann* from *Demerara* were delivered
Slout of the *Ann* into the *West India* docks, on the
M4th *March*, 1816. The Defendant employed Messrs.
an*Harrison* and *Betts*, ship brokers, of the city of *London*,
shipreport the ship, and collect the freight of the goods
*merar*ght from *Demerara* by the *Ann* from the respective
delivernees thereof, for his use and on his account; and,
rara. such employment, Messrs. *Harrison* and *Betts*
from *St.* from the consignees of the goods the freight
voyage tcby them respectively, and afterwards paid over
gust, 1815.fendant the balance of the money so received,
at *Demerar*cting the dock and other charges.
and Co., at stion for the opinion of the Court was,
and various go Plaintiffs were entitled to recover the

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entered, unless the Court should think fit, upon the application either of the Plaintiffs or of the Defendant, to turn this case into a special verdict.

This case was thrice argued. First, in *Trinity* term, 1819, by *Bosanquet* Serjt. for the Plaintiff, and *Copley* Serjt. for the Defendant. Secondly, in *Michaelmas* term, 1819, by *Vaughan* Serjt. for the Plaintiff, and *Lens* Serjt. for the Defendant. And now by *Taddy* Serjt. for the Plaintiff, and *Hullock* Serjt, for the Defendant.

Arguments for the Plaintiffs.

First, the Defendant is not entitled to retain the money he has received for the carriage of goods (*a*) by the ship *Ann*, because he was not entitled to demand it. There was no contract express or implied, no privity, between him and the parties who were to pay for the carriage of the goods; those parties contracted with *Laing*, and *Laing* alone could have sued them for the carriage. The Defendant was, under the charter-party, to be paid by *Laing* the hire of his vessel, not by the shippers or consignees for the carriage of goods. The question between carriers and the owners of goods carried, is not, whose is the waggon, or whose is the ship, but who is the carrier? Here *Laing* was the carrier, and at *Demerara* absolutely put up the ship for goods, as a general ship; it would be a great hardship, if the shippers at *Demerara*, who contracted with *Laing* for the carriage of their goods, and had no means of knowing his engagements to the Defendant, should be liable, not only to *Laing* for the carriage of their goods, but also to the Defendant for his claims on *Laing*, and this distinguishes

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the case from *Tate* v. *Meek* (*a*), where, by the very terms of the bill of lading, the shippers were referred to the charter-party, and the carriage of the goods was to be paid according to the terms of that instrument. But, as a general rule, it is clear that where there is a charter-party, the carriage for goods is to be paid to the charterer, and not to the owner, *Moorsom* v. *Kymer* (*b*); and where, as in the present case, the owner of a ship has a claim against the charterer, for the hire of the ship, the shippers or consignees of goods are not liable to pay that hire. *Paul* v. *Birch* (*c*). The Defendant, having induced the consignees to pay him in discharge of what was due to him from *Laing* the bankrupt, has in effect defeated the bankrupt laws by obtaining a preference over the other creditors, and that too, without a foreign attachment.

Secondly, the Defendant had no lien on the goods conveyed in the *Ann*. First, because he could not have sued the owners of the goods, either for the hire of the ship due from *Laing*, or for the carriage of the goods, and if he could not sue them, he could not detain their goods. Secondly, because the Defendant could not have detained the whole of the goods, till the whole of his demand against *Laing* was satisfied. He could not pretend, on any principle, to detain those for which the carriage had been paid, because the carriage due for the rest was unpaid, or because the whole of his demand against *Laing* was not satisfied; (*Phillips* v. *Rodie* (*d*), and *Birley* v. *Gladstone* (*e*), shew that the owner of a ship cannot detain goods as against the charterer for dead freight:) and yet a right of lien cannot exist, where the party claiming it, has not a right to detain all the goods

(*a*) 2 *B. Moore*, 278. *S. C.* 8 *Taunt.*

(*b*) 2 *M. & S.* 303.

(*c*) 2 *Atk.* 621.

(*d*) 15 *East*, 547.

(*e*) 3 *M. & S.* 205.

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in respect of which the lien attaches, till the whole of his demand is satisfied. Thirdly and mainly, the Defendant had no lien, because he had no possession of the ship, and consequently no possession of the goods. By the express terms of the charter-party, the ship is let to freight and taken to freight: But, he who takes a ship to freight is in all respects owner during the continuance of the charter-party, *Trinity House* v. *Clark* (*a*). So much so, that he cannot commit an act of barratry, *Vallejo* v. *Wheeler* (*b*), *Soares* v. *Thornton* (*c*). *Parish* v. *Crawford* (*d*), which held a doctrine different from that in *Trinity House* v. *Clark*, has been over-ruled by *James* v. *Jones* (*e*) and *Frazer* v. *Marsh* (*f*). In *Saville* v. *Campion* (*g*), the charter-party contained no actual demise, but merely covenants of various kinds. Here, there is a complete demise expressed in apt terms, and transferring the possession of the ship, for a given time, from the owner to the charterer and his assigns. The word assigns is alone sufficient to shew the completeness of the transfer. The charterer, too, had a supercargo on board, and took upon himself to put up the ship as a general ship at *Demerara*. In *Tate* v. *Meek*, there were no words of demise: which was also the case in *Yates* v. *Mennell* (*h*). In *Yates* v. *Railston* (*i*), the decision turned on the ground that the delivery of the goods and the payment of the freight were concurrent acts. *Hutton* v. *Bragg* (*k*), where the charter-party contained the words (though they do not ap-

(*a*) 4 *M. & S.* 288.
(*b*) *Cowp.* 143. *S. C. Lofft.* 631.
(*c*) 7 *Taunt.* 627. *S. C.* 1 *B. Moore*, 373.
(*d*) *Abbott on Shipping*, 21. 3d ed. *S. C.* 2 *Str.* 1251.
(*e*) *Abbott on Shipping*, 3d ed. 23. *S. C.* 3 *Esp. N. P. C.* 27.
(*f*) 13 *East*, 238.
(*g*) 2 *B. & A.* 503.
(*h*) 2 *B. Moore*, 297. *S. C.* 8 *Taunt.*
(*i*) *Id.* 294. *S. C.* 8 *Taunt.*
(*k*) 7 *Taunt.* 14. *S. C.* 2 *Marsh.* 339.

pear

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pear in the report,) *let the vessel to freight to the merchant, who hath, accordingly, hired and taken the same*, is in point for the Plaintiff, and is sound law according to the foregoing principles; if, however, it should be impugned, it is distinguishable from the present case, on the ground that this is an action to recover money improperly received; that was trover for the actual detainer of goods; and if the Defendant in the present case could have detained the goods, yet, he had no right to receive the money claimed, at the time and in the manner in which he received it. For,

Thirdly, even if the defendant ever had any lien, there was a complete waiver of it on his part, first, by his entering into an agreement inconsistent with the right of lien: secondly, by his delivery of the goods before the money claimed was paid. Though every special agreement will not destroy the party's lien, yet an agreement inconsistent with lien must have that effect, *Crawshay* v. *Homfray* (*a*). Here, the Defendant had agreed to give credit; to be paid, as to three quarters of the amount of the hire of the ship, by a bill at two months after the report of the ship inwards; how then could he detain the cargo on the ship's return, when his claim would not be complete till two months afterwards? At all events, lien, by the very nature of it, ceases on the delivery of the goods on which the lien arises; so that, even if the Defendant was entitled to a lien, he had no right to receive the money now claimed, for the reasons stated in the first part of the argument.

Arguments for the Defendant,

The real question is, whether, on the construction of this charter-party, the absolute possession of the vessel passed to *Laing*? The instrument undoubtedly contains

(*a*) 4 *B. & A.* 50.

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in the beginning, the most comprehensive and apt words of demise; but they are not of themselves conclusive, and the construction must be sought from the context and intention of the whole: for, as words which are not apt words of demise will constitute a demise, if upon the whole a demise appears to have been intended by the parties; so apt words of demise will not of themselves constitute a letting, if, on the whole, a contrary intention appears, *Bac. Abr. Leases*, K., *Doe* v. *Ashburner* (*a*), *Poole* v. *Bentley* (*b*), *Tempest* v. *Rawling* (*c*). Undoubtedly, there may be cases in which the absolute possession of a ship may pass to the lessee, as if it should be let for a term of years, and the lessee should appoint and pay the master and crew, and provide for the repairs; but such is not the case with ordinary charter-parties, nor is such the mercantile construction put on those instruments. A man does not hire a ship as he hires a house, for the purpose of having absolute and exclusive possession, but merely the use of the hull, for the conveyance of his goods. Notwithstanding the words *let to freight* and *taken to freight*, all the provisions of the present charter-party are inconsistent with absolute possession in the charterer, or with abandonment of possession by the owner. The owner appoints and pays the captain and crew, the repairs, and most of the expenses incidental to the ship; the captain and crew are his servants, and if so, their possession is his possession; the captain receives and stows the goods sent by the charterer; the captain is to assist with his boats, but such assistance is not to interfere with the duties and operations of the ship, which shews that the assistance is not given by him in the character of servant to the charterer. If the ship had run down another vessel, the

(*a*) 5 *T.R.* 163.
(*b*) 12 *East*, 168.
(*c*) 13 *East*, 18.

master

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master and owner would have been liable to be sued, and not the charterer. The decision in *Hutton* v. *Bragg* has often been impugned, and in that case, the attention of the Court was not particularly called to the nature of the owner's interest, after he has entered into a charter-party. But in *Saville* v. *Campion*, the Court expressly relied on provisions similar to those contained in the present charter-party, to shew that the absolute possession did not pass to the charterer. The decision in *Trinity House* v. *Clark*, turned entirely on the nature of the service in which the vessel was engaged, which being the public service, it was essential to the success of the undertaking, that the charterers should be taken to have the full and undisputed possession. *Soares* v. *Thornton*, and *Vallejo* v. *Wheeler*, only decide that the freighter (whether under a charter-party or not) is owner, *pro hac vice*, as far as respects an act of barratry; but that does not touch the present question; for the freighter may, by agreement, have such a power as to dispatch the vessel in any direction he pleases, though the possession of her may remain in the owner, and the owner be himself on board. In *Paul* v. *Birch*, the decision was, that the owner of the vessel could not detain the goods against the consignees, to discharge the hire of the ship due from the charterer. The Defendant, in the present case, did not detain the goods from the consignees, or for the hire due to him by *Laing*; but, being in possession of the ship, he received sums due for the carriage of the goods conveyed at his expense, and in his vessel. If he were afterwards to sue *Laing* for the whole amount of the hire on the charter-party, the sums so received, would go in part discharge of that hire; but provided he do not recover twice, there can be no reason why the Defendant should not have more than one remedy for the compensation due, for the use of his vessel. In *Phillips* v. *Rodie*, and *Birley* v. *Gladstone*,

stone, the goods were detained against the consignees for dead freight due from the charterer; a claim which is not contended for in the present case. It may be admitted, that a party abandons his lien, by agreeing to give credit, (and that was the case in *Crawshay* v. *Homfray*,) but it is immaterial whether a payment be by money or bills. In *Tate* v. *Meek*, *Yates* v. *Railston*, *Saville* v. *Campion*, and *Horncastle* v. *Farran* (*a*), the payments were all by bills. In the last case indeed, the bills were given and negotiated, and on that account the lien was held to be waived; but here the bills were not given on the return of the ship, nor any payment made.

DALLAS C. J. This case has been so often and so fully before the Court that it is not necessary for me to re-state the facts. The general question depends on these general grounds. The Defendant, the owner of the ship, contends that he had a lien on the goods on board, for the freight due, or on the money received for such freight. To have a lien, he must have had at the time of the asserted exercise of it, the possession of the ship. He had the possession when he executed the charter-party, — and the question is, whether, by the charter-party, he has parted with the possession for the particular voyage? And I will say, in the outset, this is not like the common case of a carrier, who has, in point of law, known rights and known liabilities. These depend on the law, as it applies to the case of carriers; but the carrier may vary his general liability by special agreement; so may the ship-owner, even if he could be treated as a common carrier; and the charter-party constituting the specific agreement between the parties, it is upon the effect of it that the question arises. This case appears, therefore, to me, in the general view of it, to depend on *Hutton* v. *Bragg*; and if *Hutton* v. *Bragg*

(*a*) 3 *B.* & *A.* 497.

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be law, it must govern now. In *Hutton* v. *Bragg*, on the best consideration I could give the case at the time, I concurred in opinion with the late Chief Justice and my Brother *Park*. My Brother *Burrough* was absent, and we had not then the benefit of my Brother *Richardson*'s assistance on the bench. The having concurred in the former judgment would be no reason for my not delivering a different opinion now, if I really entertained it. I never could agree with an expression I have met with, namely, "I must so decide to be consistent with myself," though the words came from a person of all others the most entitled, if at all, to make use of them. No man is bound to be, or has a right to be, consistent in error; but, before he consents to overturn a judgment in which he concurred, he ought most clearly to see that he was formerly wrong. If such were my case, I should, therefore, only lament having been wrong before, but certainly should not persist in being wrong now. It is equally incumbent on those, (and for reasons which I fully admit, and of which I as fully approve) to deliver a different judgment now, who see the point now, in a different light. On this part of the subject, I will only further say, if it required to be adverted to, that scarcely a question can occur in which I can have less reason personally for maintaining a former opinion. The judgment delivered, was delivered chiefly by the late Lord Chief Justice, and what weight his opinions had, because they were entitled to have, with his Brothers on the bench, it is not necessary for me to state. From a judgment maturely formed by him and assented to by me, it would not be blameable, I think, if I felt a little reluctance, even upon this ground alone, to abandon it, when he can no longer re-consider the opinion which he then delivered, and support or renounce it, as by the argument which we have now heard and those which have preceded it, he might have been led to do. Still, however, I agree, it results to the consider-

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ation of what is the opinion we may respectively now entertain, and the degree of assurance with which that opinion is formed; and what I have said, I have said only for reasons which, in the sequel, will appear.

And first, I shall begin by stating, that *Hutton* v. *Bragg*, being directly in point, I know of no case, as I understand the cases, before nor since, (nor has any such been cited,) repugnant to it; none repugnant in decision; none, of necessity, inconsistent in point of principle; none, in point of analogy, the other way. I have read in loose and confident assertion, that the decision excited surprise at the time; and I have no hesitation in saying, that the case did not, I believe, meet with universal concurrence, and this may be taken even more strongly if necessary. It is enough for me to know the doctrine in question has received the sanction of this Court, which never has been expressly dissented from by any other; that this is now the third time it is argued here, and that it was intended to have been argued before all the Judges, if the convenience of the other Courts would have permitted; and I lament that it did not. Do I, under these circumstances, entertain a degree of conviction sufficiently strong that the former judgment was erroneous, is the question which, with reference to myself, I have been bound to consider; doubts entertained are not sufficient to overturn a decision pronounced. Much has been said of convenience or inconvenience one way or the other; on this I put no stress, for this is a case which is not to lay down any rule of general operation for the future, but to turn upon the language of an instrument which may be differently framed in all future cases, and may have been, and, if common prudence has guided the conduct of the parties, must have been in all cases since *Hutton* v. *Bragg* was decided.

It is admitted, and indeed it is self-evident, that a ship may be let to hire, so as to constitute the party hiring

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hiring the owner for the time, provided that such appears upon the instrument to be the intent of the parties; and this may be done by apt words of hiring and letting, or by necessary construction. But, it is said, that the mere words of hiring and letting will not, of themselves, invest a party with the possession of the ship, if all the provisions of the instrument qualify and restrain the words, and shew that the hiring and letting were not used in their ordinary sense and signification; in other words, that the construction must be on the whole instrument; and to this I agree, subject to this qualification, viz. that if the separate provisions of the instrument would be manifestly repugnant to giving such a construction to the general words, they ought not to receive it; but, if there be no direct repugnance, then the general words being emphatic and essential words, and words applied to other subjects of known legal operation, cannot be rejected, but must operate according to their common, and, still more, their received legal import. And to this the question comes, for I must here again observe (there being nothing incongruous in the nature of the thing, that a ship should be let to hire so as to make the hirer the owner for the time, and whether so let or not depending on the nature of the agreement) it resolves itself into a mere question of construction in the particular case.

What then are the general words in this case, and what the special provisions? The words are, on the part of the ship-owner, "granted and to freight let," and of the charterer, "hired and to freight taken," than which, of themselves, I know no words more apt to let pass the possession of a ship as well as of a house, though I agree the subjects are different; they are words of grant and demise, and pass possession in the particular case. Such is the opinion of Lord *Ellenborough* in the case of *The Master of the Trinity House* v. *Clark*; his

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his lordship's words are "The charter-party 'grants' the ship 'and lets it to hire and freight,' (the very words of this case) which are proper words of lease, and would, of themselves, pass the possession. The purpose is mentioned, but the mention of the purpose does not restrain the possession, though it may restrain or qualify the use of the thing let to hire." I refer to this case, not as in point as to the decision, but for the construction of words similar in both charter-parties, and so far, at least, Lord *Ellenborough*'s opinion is in point, and as to the other grounds of decision in the case so referred to, I shall presently advert to them. In *Saville* v. *Campion*, Lord Chief Justice *Abbott* says, "The terms of the charter-party in the case of *Vallejo* v. *Wheeler* are not very clearly shown in the report of the case, but it has always been considered that the ship was thereby let to freight. In the case of *The Trinity House* v. *Clark* the deed was in that form, and in the judgment in that case great reliance was placed on the objects and purpose as well as on the terms of the deed. The charter-party in the case of *Hutton* v. *Bragg* was also in terms of letting to hire." — "In the case now before the Court the charter-party contains no such terms." And here, again, I would observe, I cite this case only for the materiality attached as in the former case to these words, and not for the whole case, as in point to the present; for in fairness I should say, as far as I know the opinion of the Judges in that Court, they are not, probably, favorable, on the whole, to *Hutton* v. *Bragg*. But it is said, that "letting to *freight*," are words to be understood in opposition to the letting of the ship, and are to be deemed a mere specification of the mode in which the ship was to be employed; to this I have already given the answer, namely, that the words were precisely the same in the case of *The Corporation of the Trinity House* v. *Clark*, where no such distinction was taken, still less adopted;

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and in which the construction was expressly put as in the subsequent case, that such words by themselves would pass the possession of the ship; but it is to be observed the words are not only, "to freight let," the words are "for freight and hire" of the said vessel for such voyage.

If, then, these words would, of themselves, pass the possession of the ship, what is there in the other provisions of the instrument repugnant to it, and to turn the words round to a meaning different from what they would otherwise bear? In the first place, it is in terms a letting and taking of the *ship*, that is, the whole ship; next, it is not a taking of so much tonnage, or according to a settled rate of tonnage, but a gross sum for the whole voyage. It was competent to the charterer, therefore, to make any contract with others for the freight of their goods, and to put her up as a general ship from the moment of the execution of the charter-party for the voyage contracted for. Their contract would, therefore, be with the freighter, and not with the general owner; and so was it in this case — goods were sent on board on a contract, not with the actual owner, but with the freighter or temporary owner. So far there is nothing in the particular provisions repugnant to a general letting and hiring, but co-incident and consentaneous with it; it being sufficient, however, that there is nothing discordant or repugnant. But, it is said, the master and the crew were appointed by the owner; that the management of the ship remained with the master; that this constituted a continuing possession; and that the charter-party is but, in effect, a covenant to convey, modified by a detail of stipulations for managing the ship, so as not to disturb the actual ownership: and this ground has been mainly relied on.

That it has weight, I do not mean to deny; but, that it over-rules the words of grant and letting, is that which

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which I cannot admit. A ship may be let with a stipulation that she shall continue to be navigated in all respects as before, and the services of the master and crew may be let together with the ship. And for this I shall only again refer to the case of *The Trinity Corporation* v. *Clark*. "It is urged," said Lord *Ellenborough*, "that the use and service of the ship only are parted with, and that the possession and ownership are retained by the conduct and navigation being left to the mate and crew, who are the servants of the owners of the ship, chosen and fed and paid by them." Now how is it that his lordship meets this? "The whole argument," he says, "rests on a fallacy: the possession, such as it is, of the master and crew is not retained by the proprietors of the ship to interfere with the full and free use of the ship, but as subsidiary and subservient to it.—The vessel, therefore, is not only hired, but along with it, the services also of a certain number of persons paid by the proprietors, and necessary to the use of the vessel.—It is the same thing as the hire of a waggon and team for a certain term, the proprietor of the waggon stipulating that the waggon should be driven and the horses taken care of by his own waggoner and boy;" and after dilating a little more upon this instance, he quits the subject, by saying, "This is indeed *idem per idem*, but, as the instance is more familiar, it serves to put the point in a clearer light." In another part of the report, Lord *Ellenborough* is made to say, "As a general proposition, it is hardly denied, on the present occasion, that the charterer of the ship is the owner *pro hac vice*, but the precise point made here is, that the appointment and employment of the crew are left to the owner, as to which we have already given our opinion," which opinion was that which I have read, *viz.* that this does not make it less a letting of the ship. In the present case, therefore, as in *The Corporation of the Trinity*

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House v. *Clark*, the master and crew, continuing in the employment of the actual owner, form no argument against the ship being let; but the letting of the ship, with a stipulation for their continuance, is not less a letting on account of such stipulation. So that here again it comes round to the general question, — what is there in this charter-party to restrain the operation of the general words, by which I mean the words of granting and letting the ship to freight on one side, and of hiring and taking on the other? — certainly not these provisions, according to Lord *Ellenborough*'s opinion. In referring to these two cases, I have already disclaimed citing them as authorities, as to the grounds of decision for the present case. In *The Corporation of the Trinity* v. *Clark*, the decision was formed on two points; first, the words of grant and demise, and, secondly, the nature of the service: — and it may be fairly said, if the words of letting alone were sufficient why call in aid the nature of the service? But it may as fairly be answered, why not rely entirely on the nature of the service, without calling in aid also the words of hiring and letting; and further, why appear to enforce them as emphatic and essential words, and make them, though in part, the ground of decision? The fair result of the case in its application to the present, I, therefore, conceive to be, that the words, which were in that case and are in this, are sufficient to constitute the freighter the owner for the particular voyage, unless inconsistent with the general effect of the grant; and what was chiefly relied upon in this case, was relied upon in that, and not held to restrain the general words; and though I admit the nature of the employment to be different, still, such difference, in my view of the two cases, raises no repugnance; and, therefore, the general words are left to their full operation and effect.

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As to the case in *Barnewall* and *Alderson*, I will only remark, that it professes not to overturn *Hutton* v. *Bragg*, but expressly distinguishes it from the case then under consideration, as not having the words of hiring and letting, and though not going the length of saying these words would have made the difference, still the words are referred to as sufficient to constitute a distinction; and, at any rate, it leaves *Hutton* v. *Bragg* on its own ground. In fairness, however, I ought to add, that the distinction was, I apprehend, chiefly pointed out, as rendering it not necessary to interfere with *Hutton* v. *Bragg* one way or the other. Again, therefore, I have referred to both cases, not for the grounds of decision, but for the doctrines they contain.

I forbear to rely on *Vallejo* v. *Wheeler*, being willing to admit that what is said by Lord *Ellenborough* may make a distinction, namely, that it must be confined to the subject agitated in it, that is, against whom *barratry* may be committed; and further, having no reason to doubt what is said by Lord Chief Justice *Abbott*, in *Saville* v. *Campion*, "The terms of the charter-party are not very clearly shown in *Vallejo* v. *Wheeler*, but it has always been considered that the ship was thereby let to freight."

These are my grounds for not consenting to overturn the decision of this Court in *Hutton* v. *Bragg*; not that I entertain, nor would it become me to entertain, any very confident opinion, or an opinion not mixed up with some doubt. But, to overturn what has been solemnly decided, I have already said, I must have a confident conviction that such decision was erroneous. This I do not sufficiently entertain, and I am the less anxious as to the result, because, as I shall probably be single in the opinion I now give, no harm can result to the parties in the particular case: and with respect to any general rule, the result of the case is quite immaterial; for, decided one way or the other, parties may,

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in future, frame their charter-parties accordingly. I am therefore of opinion, that judgment should be for the Plaintiffs.

PARK J. I am sorry to differ from the very able, luminous, and candid opinion which has just been delivered; and it is to be lamented that so many cases have arisen upon charter-parties, owing very much to the obscure language in which those instruments are frequently framed, and to their being prepared by persons totally ignorant of the rules of law.

The question, however, in all these cases, generally has been a question of construction, or rather a question of fact arising out of the construction, whether there has been an entire letting or parting with the possession of the ship for given purposes, so that, during that time, the owner has no efficient controul, but the charterer has the full disposition of the ship: or, in other words, to use the language of Lord Chief Justice *Gibbs* in *Tate* v. *Meek*, whether the delivery of the cargo and the payment of freight are to be considered as concomitant acts. When the fact is ascertained, the legal result is clear. Now, when this distinction of fact is attended to, the cases may all be explained, I won't say reconciled; because various Judges, at different times, have given a different construction. If all had agreed, the same result would have followed; because, in looking through all the cases, I uniformly find that all agree that it is only upon the entire and absolute parting with the possession and controul of the ship, that the charterer is to be considered as owner *pro hâc vice*. Thus, in *Vallejo* v. *Wheeler*, the charterer (whether rightly or not) was to be treated as owner; and then all agree, as was considered by Lord Chief Justice *Abbott* in *Saville* v. *Campion*, that all the duties, rights, and privileges of owner attached upon him in a question

question of barratry; and there is a great difference between cases of barratry, especially where (as in that case, as well as in that of *Soares* v. *Thornton*, afterwards in this Court) the great question was, whether the charterer was so far owner as to prevent him from being defrauded of the benefit of his insurance by the barratrous conduct of the original owner. So, in the case of *The Trinity House* v. *Clark*, the Court considered the crown as actual temporary owner, from the nature of the charter-party, which was not for any specific voyage, but for various duties and stations, all to be regulated as the exigency of the public service might require, granting the ship and letting it to hire and freight, which, says Lord *Ellenborough*, are proper words of lease, and would pass the possession. "From all which expressions in the instrument (said his Lordship), and from the nature of the service stipulated for, which is of the utmost importance, and might be delayed, and even frustrated, if the crown was not authorised to take possession of the ship to secure its immediate execution, but was left to a bare action of covenant against the proprietors of the ship, if they were to refuse to permit their ship to sail, it is contended that the crown had an executed right of possession in, and was legally and actually possessed of, the ship, and owner thereof, within the meaning of these charters, during the period in which the services were performed, which gave rise to these claims." — "It is evident that the service contracted for is of the highest importance to the country, and that its most valuable interests may depend upon the immediate execution of such service, as this charter-party authorises the crown to require, and the proprietors of the ship agree to perform. Whatever construction of the contract enables the crown to enforce a prompt obedience to its terms, must be most agreeable to its spirit and intent. If the proprietors of

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the ship, from whatever motive, were authorised to insist that the officers of the crown had no right to enter the ship, but were driven to their action on the breach of the contract, infinite and irreparable mischief might be done to the public service by the delay."

Now, let us look to the covenants in the present charter-party, all of which, in my mind, are perfectly inconsistent with the notion that the ship was actually parted with by the original owner.

It is true, in the outset, the owner states he *has granted and to freight let*, and that the freighter *hath hired and to freight taken*; but these instruments are all to be taken together, and we are to see whether, upon the whole, the parties intended to part with the possession. These words, or nearly the same, are to be found in *Yates* v. *Railston*; and yet it was held, in that case, that there was a parting with the ship.

In *Morgan, dem. Dowding*, v. *Bissell* (a), it is said, "When the party enters into that, which on the face of it appears to be an agreement, though there are words of present demise; yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only." And in *Soares* v. *Thornton* (b), Lord Chief Justice *Gibbs* says, "The words *let to freight* I pay no regard to." The truth is this, these words are strong, when coupled with other circumstances in the instrument, to show the intent; but they are by no means conclusive.

The owner provides, that the ship shall be "well manned, tackled, apparelled, and furnished for the voyage hereinafter mentioned;" and that "the master, &c. is to receive and deliver the goods." How could he receive but into the owner's possession; and how could he deliver out, if the goods were not in his possession?

(a) 3 *Taunt.* 65. (b) 7 *Taunt.* 640.

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These covenants would be perfectly nugatory if the freighter had the entire possession of the ship; for, then, he would receive, stow, and deliver, as and when he pleased. "The ship's boats to be assisting, properly manned, provided no impediment is thereby to be made in carrying the exclusive operations or duties of the ship." What duties of the ship could be inconsistent with those of an absolute owner *pro hâc vice?* Notice, too, is to be given to the freighter's agents of the time of loading, — treating him and the ship owner as distinct persons.

The mode of payment too is material, evidently showing the payment and delivery to be concomitant acts: nay, stronger than concomitant acts; for the delivery of the bills was to precede the delivery, *viz.* at two months' date from the day the ship was reported at the custom-house. And this fact differs this case from that of *Crawshay* v. *Homfray* (*a*), where the payment was to be long antecedent to the delivery; and, therefore, there could be no lien.

The case, for we are not left to infer it, finds that *William Wilson*, and the crew of the *Ann*, *were hired* and employed to navigate, and that the *ship* was navigated *at the owner's expense.*

Under all these circumstances, I cannot bring myself to think that the owner here had given up the controul of his ship; and, as it seems to me, my opinion is well borne out by a vast variety of cases.

The case of *Tate* v. *Meek*, decided in this Court, appears to be almost in point. It is true, the words "*let* to freight" are not to be found in that case; and I have endeavoured to shew that these words are not conclusive to show that the owner has given up all controul over the ship, if it can be shown from the rest of the

(*a*) 4 *B.* & *A.* 50.

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instrument that such was not the intention; but in all other respects it is decisive. In *Yates* v. *Railston* the words "let to freight" are to be found, and yet the same construction prevailed; and so also in *Yates* v. *Mennell*, though, in the latter case, these words are not to be found.

Since those cases were decided, the case of *Saville* v. *Campion* has arisen in the Court of King's Bench; and every word of Lord Chief Justice *Abbott*'s opinion bears strongly upon the present case. In that case there were no words of *letting*; but, it was contended, that there need not be express words of demise, but that any words plainly showing that the one party is to give up to the other, and the other to take and hold possession for a definite time, are sufficient to constitute a lease; and this, said his Lordship, is true. "But (he continues), on an attentive consideration of the charter-party in the present case, we find nothing either in its language or in its object, which imports that the merchant charterer was to have the possession of the ship. The whole instrument contains matter of contract and covenant only." Lord Chief Justice *Abbott* then reviews the contract, in which is a special clause providing that the freighter may appoint a supercargo, to take upon him the authority of the commander in the stowage of the cargo; but not to interfere with the duties of the commander in any other manner, without his leave; and, after many observations, all tending to show that it was not intended that the freighter should have possession of the ship, he confirms the case of *Tate* v. *Meek*.

The case of *Bohtlingk* v. *Inglis* (*a*) is not immaterial in the present enquiry. There it was held, that where a ship was chartered for a voyage to *Russia*, and to bring goods home from the charterer's correspondent

(*a*) 3 *East*, 38. *Ibid*, 396.

there,

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there, who accordingly shipped the goods on account, and at the risk of the freighter, and sent him the invoices and bills of lading of the cargo, the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop the goods while *in transitu* on board the same to the vendee, in case of his insolvency in the mean time before actual delivery, any more than if they had been delivered on board a general ship for the same purpose. Now, why was it so held? Because the owner had not parted by such charter with the controul of his ship. If he had, a delivery on board such a ship to the use of the vendee of the goods and charterer of the ship, the owner, *pro hâc vice*, would, as was contended, have prevented the owner of the goods from exercising his right to stop *in transitu*. But Mr. Justice *Lawrence*, in delivering the opinion of the Court, says that the vendee had no controul over the ship, and had merely contracted with the master, to employ his ship in fetching goods for him. I may, perhaps, be supposed to run in my opinion counter to *Fowler* v. *Kymer* (a), quoted by Mr. Justice *Lawrence*. But that case states the very distinction on which I form my opinion; for, in that case, there was a letting of the ship for a term of years to the bankrupts, they finding stock and provisions for the ship, and paying the master, *during which time they were to have the entire disposition of the ship, and the complete controul over her.*

It is supposed, that the decision which I, for one, purpose to make, is in direct contradiction to the opinion of this Court in *Hutton* v. *Bragg*, in which I myself concurred. I certainly did concur in the judgment there given; but I hope, if I discover that I have at any

(a) 3 *East*, 396.

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time erred in judgment, I, in common with my Lord Chief Justice, who has so well expressed himself on the point, and my Brothers, shall have the manliness with cheerfulness to avow my error. I am sure, if I do not, my conscience will be ill at ease. Whether my present opinion is counter to that, it is not, therefore, my present business to enquire; but of this I am quite satisfied, that the opinion there delivered by Lord Chief Justice *Gibbs*, Lord Chief Justice *Dallas*, and myself, proceeded upon the notion that there was an entire letting and parting with the possession of the ship; and then it falls within the principle of the rule which I stated in the outset. That this was so in all our opinions is clear from our decision in *Tate* v. *Meek* so shortly afterwards, when the case of *Hutton* v. *Bragg* was fully under our consideration; and this struck the mind of the Lord Chief Justice *Abbott* in giving judgment in *Saville* v. *Campion*, for his lordship says, "The case of *Hutton* v. *Bragg* was in terms of letting to hire." Whether that case was well or ill decided is not for me to say, (properly, I am sure it was intended to be) but, upon this case, I am satisfied (though not so perfectly as I should be, if I had the good fortune to concur with his lordship) that the Plaintiffs are not entitled to recover.

Burrough J. Before I give my opinion on the main point in this case, I have some observations to make on some other matters which have arisen in the course of the argument.

First, I think, that if a lien ever existed, it has not been divested by means of any thing in the charter-party coupled with the acts stated in the case. The stipulated freight was to be paid by bills, one quarter of it by a good bill or bills, on a right delivery of the cargo at *New-*

foundland,

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foundland, at sixty days' sight: The remainder by a good bill or bills at two months from the day of the ship's report inward, in the port of *London*.

The first bills were given, but dishonored by the bankrupt when they became due, on the 26th of *August*, 1815. The second set of bills were never given, nor were any tendered. As to this, the first act, the giving or tendering these bills, was to be done by the freighter or his agents. This, therefore, does not affect the Defendant's case.

In the next place, the lien has not, I think, been divested, by a delivery of the cargo; for, on the day the ship was reported at the Custom-house, and, consequently, before any delivery, the Defendant gave notice to the directors of the *West India* docks, not to deliver the goods without the orders of Messrs. *Harrison* and *Betts*, who, afterwards, under the Defendant's employment, received the freight from the consignees of the goods.

It has been urged, that the person who put the goods on board at *Demarara*, (on which this freight arose) were strangers to the charter-party. In answer to this, I am of opinion, that they cannot be so considered: for, the goods to be shipped on board at *Demarara*, were by the charter to be such, as the freighter or his agents should send. The shipper of these goods, therefore, must be taken to have acted under the authority of the freighter, and must be deemed to have notice of the charter-party and its contents.

As to the main point, it appears to me that, in former cases of this kind, too much stress has been laid on a supposed analogy between the words "hath granted, and to freight let," and "hath taken to freight," in charter-parties; and the words, "hath granted and to farm let, &c." in leases of land and houses.

When

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When the nature of the transaction, and the words of the charter-party are considered, I am of opinion that the construction contended for, namely, that the possession of the ship passed to the charterer, cannot be supported.

The words are "hath granted and to *freight* let, &c." What then was the object in view? It was to engage the use of such parts of the ship, as are used for the stowage of goods, and not to put the owners of the ship out of possession of the ship, which possession they actually had by their master or commander; and the mariners hired and employed by them. The words of the charter-party, shew this to have been the intention, and there appears to me to be no reason for extending the construction farther, except it be for the purpose of depriving the owners of their lien.

As to leases of lands and houses, their nature and object are very different. There, the one party takes the land or house for the purpose of occupation; the land he takes to cultivate, the house he takes for his actual residence, and it is necessary in both cases that he should have exclusive possession.

After the case of *Hutton* v. *Bragg*, the cases of *Yates* and others v. *Railston*, the same against *Mennell* and others, and *Tate* v. *Meek*, came on to be tried before me at *Guildhall*. On its being stated by my Brother *Lens*, that the case of *Hutton* v. *Bragg* was not satisfactory, I remember to have said, that had I been in Court when the latter case was decided, I thought I should have agreed in the judgment there given. But, I have been since necessarily drawn to consider that case with attention: I confess, I think that it is not law; and I am now persuaded, that the true construction of the charter-party, (connecting the object of it, and the language of it throughout,) is such, that it has not the

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effect of passing the possession of the ship to the freighter. The consequence is that, in my opinion, the Defendant is entitled to judgment.

RICHARDSON J. I am of the same opinion. By the law of *England* and of all commercial countries the owner of a ship has a lien on the cargo for his freight; and this doctrine is laid down in many well known books of authority. Agreements may, undoubtedly, be entered into by which the owner may consent to relinquish this right, but the mere circumstance of his entering into an agreement touching the mode in which he shall be paid for freight, will not, of itself, divest him of his right to lien; that can only be excluded by express terms, and there are no such terms in the present charter-party. The questions, then, that arise in this case, are two. First, whether the owner's lien has been excluded by the terms of the charter-party which he has signed; secondly, whether there is any difference in the case, on the ground that the defendant has delivered the homeward cargo, and has received the freight upon the bills of lading, which freight is different from that due upon the charter-party?

On the first point, the case of *Hutton* v. *Bragg* presents a difficulty. However, I do not think it necessary to deny the principle laid down in that case, but only the application of the principle. It is quite clear, that decision turned on the assumption that the owner, by the terms of the charter-party, had parted with the possession of his vessel; and, certainly, cases may arise in which such a transfer may take place: as if the owner were to demise a ship for a term of years, and the charterer were to have the appointment of master and mariners, and incur the expense of wages and repairs; but such is not the usual course of proceedings in the mercantile world

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world, nor is such the common form of charter-parties, which, though they sometimes vary in form, have, in general, no other object than to lend the use of the ship. In *Hutton* v. *Bragg*, however, the Court relied on the words of demise in the charter-party, that the owner "had let to freight," and the charterer "had taken" the ship; and, if it had been the intention of the parties that the entire possession of the ship should pass from the one to the other, those words would have been material. That they are not conclusive to pass the possession, appears from the case of *Yates* v. *Railston* decided by the same judges who decided *Hutton* v. *Bragg*. I am aware that in *Yates* v. *Railston* there were material circumstances which distinguish it from *Hutton* v. *Bragg*. For instance, in *Yates* v. *Railston* the bills of lading refer to the charter-party; but, if the words "grant and let" pass the possession, those other circumstances could not countervail them.

The cases, then, show, that words of demise, though material, are not decisive on the question of possession; and, in the case of *The Trinity House* v. *Clark*, the right of possession was held to result rather from the nature of the service in which the vessel was to be engaged, than from the terms of the charter-party by which she was let to hire. It seems, therefore, that, in the present instance, the question must turn entirely upon wkat was the intention of the parties as it is to be collected from the whole of the instrument taken together: that is the case also in demises of land, which may take place or not take place either with or without apt words of demise, as shall appear from the whole of the instrument to have been the intention of the parties.

Before I examine the nature of the charter-party now in dispute, I must observe with regard to the cases of

Vallejo

Vallejo v. *Wheeler*, and *Soares* v. *Thornton*, that the result of those decisions is no more than that, in respect of the offence of barratry, the freighter may be deemed ship-owner *pro hac vice*, whether there be words of demise in the contract between him and the owner or not. But those cases do not at all affect the question of possession, while the cases of *Yates* v. *Railston*, *Tate* v. *Meek*, and *Saville* v. *Campion*, have established that, with or without words of demise, the possession may remain in the ship-owner, for the purposes of lien. Here, then, I shall refer to the terms of the present charter-party, in order to ascertain that intention. Now, though the instrument sets out with general terms of demise, yet every subsequent provision is inconsistent with those terms. The freighter is to send the goods *along-side*, the master is to receive and properly stow them on board, and deliver the cargo *from along-side* to the agents or assigns of the freighter; so that the owners of the goods are not so much as to enter the ship. The boats are to assist the freighter, but not to the interruption of the regular duties of the ship. The ship-owner might, if he liked it, have sailed himself as master, and the master's possession was in effect that of the ship-owner, so that the possession thus remaining in him, there is nothing to exclude the general law which gives him a lien on the cargo towards the amount of his freight.

Upon the second question it is not necessary to hold that the goods of strangers are liable for all the freight due on the charter-party, exceeding the freight mentioned in the bills of lading. It is true, that, according to the decision in *Paul* v. *Birch*, the owner has not a lien on the goods mentioned in the bills of lading for all his freight due on the charter-party, but he is entitled to the freight on the bills of lading, in preference to the freighter;

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freighter; and, in the present instance, the owner has neither asked nor received more than was due from each consignee, for the conveyance of his goods. The owner has a lien on the goods mentioned in the bills of lading, as a security for his freight due on charter-party, to the extent of the freight on the bill of lading. But, it has been said, that his lien on the goods was, at all events, lost by the delivery of them to the consignees. Undoubtedly, if a party loses possession of the article on which he has a lien without enforcing payment of his demand, his lien must cease to have existence. Here the owner was bound to deliver the goods on the payment of that freight being made; if, then, he had a lien on the goods, and was bound to deliver them on the sum being paid, to the amount of which his lien extended, it would be absurd to deprive him of the very sum obtained by the assertion of his right to a lien; as he had a lien to the amount of the freight due on the goods, he had a right to retain the money received in respect of that freight, and it seems to me, therefore, that there must be Judgment for the Defendant.

Judgment for the Defendant accordingly.

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FRANCIS GUNTON *v.* NURSE.

Feb. 7.

TROVER for a filly. *Lynes* had sued *Benjamin Gunton* in trespass for taking away a filly. *Benjamin Gunton* justified that the filly belonged to his brother *Francis Gunton*, and that he, *Benjamin*, took the filly by his brother's command. At the trial, a verdict was found for *Lynes*, with 25*l.* damages, subject to the award of *Nurse*, one of the jurymen, to whom the filly was delivered with the consent of *Lynes* and *Francis Gunton*, in order to be kept by him till she shed her coat, when, if a scar should appear near her shoulder on the off side, the verdict for *Lynes* was to stand; if no scar appeared, a verdict was to be entered for *Benjamin Gunton*. These were the terms of the order of *Nisi Prius*, under which the parties submitted to arbitration.

A. sued *B.*, in trespass for taking a filly; *B.* justified that the filly belonged to *C.*, and was taken by *C.*'s command. Verdict for *A.*, with damages, subject to an award by *D.*, to whom the filly was delivered with the consent of *A.* and *C.*, in order that *D.* might determine, in a given time, whether the filly was marked with a certain scar; in case the scar should appear, the verdict for *A.* to stand. *D.*, by his award in due time, stated that the scar had appeared, and ordered the verdict to stand. Ten days after, *C.* demanded the filly of *A.*, who refused to deliver it; a month afterwards *C.* sued *D.* in trover for the filly: Held, that this detention of the filly by *D.* did not amount to a conversion.

On the 26th *May*, 1819, when the filly had shed her coat, *Nurse* made his award, stating, that there was a scar near the shoulder of the filly, on the off side, and ordered the verdict for *Lynes* to stand, but did not deliver the filly to any one. On the 6th *June* following, *Francis Gunton* demanded the filly of *Nurse*, who refused to deliver it. In a month afterwards, the filly not having been delivered, *Francis Gunton* commenced the present action of trover against *Nurse*, which was tried before *Dallas* C. J., *Norfolk* summer assizes, 1820, where, on the before mentioned facts, the jury found a verdict for *Francis Gunton*, and leave was granted to *Nurse* to move to set this verdict aside, and enter a nonsuit. Ac-

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cordingly, in the last term, *Vaughan* Serjt. having obtained a rule *nisi* to that effect,

Blosset and *Taddy* Serjts. now showed cause on the ground, that though the filly had been delivered to *Nurse* with *Francis Gunton*'s consent, yet it had been delivered for a particular purpose, which, purpose having been effected on *Nurse*'s making his award, he became *functus officio*, had nothing more to do with the filly, and had no right whatever to detain it. That, under these circumstances, the refusal to deliver the filly on *Francis Gunton*'s request was a complete conversion, *Francis Gunton* being the party really interested in the filly, though *Benjamin Gunton* had been the nominal Defendant in the former action, the verdict in which had, together with the award, entitled *Lynes* to 25*l.* damages; but neither of them invested him with any title to the filly, which, it was but reasonable, *Francis Gunton* should have, as he was now bound to pay the 25*l.*, and it could never be intended *Lynes* should have the 25*l.* and the filly too.

Vaughan Serjt. in support of the rule, contended that, under the very doubtful circumstances attending the property in this filly, the fact of the arbitrator having detained it for five or six weeks after making his award, did not amount to a conversion; he ought to be allowed a reasonable time to consider how he should act, and, at all events, the demand should have been made by *Benjamin Gunton*, the Defendant in the first action, or under his authority.

DALLAS C. J. The only question is, whether the Defendant has been guilty of any unlawful conversion, and this is an application which ought not to be favoured in law or justice. Arbitrators would be placed in a dangerous

gerous situation, if they were liable to actions of trover after they had decided according to the best of their judgment. (Here his Lordship stated the facts of the case.) In the strictest sense of the order of reference, the arbitrator, after deciding on the 26th of *May*, that the filly belonged to *Lynes*, could never be called on to deliver it to *Francis Gunton*, the present Plaintiff. If either of the *Guntons* were entitled to claim the filly, *Benjamin* was so entitled, who was the Defendant in the preceding action, and liable to pay the damages; and it does not appear that *Francis Gunton* ever applied in the name or with the authority of *Benjamin*, so that, as against *Francis*, the arbitrator could in no way be charged with a conversion.

PARK J. I am happy to concur in the opinion just delivered, because, if the Court were to come to another conclusion, their decision would have a tendency to discourage the recourse to the useful domestic forum of arbitration. I shall confine myself to the question, whether the Defendant unlawfully converted the filly or not, and the period we must look to, in order to answer the question, is the 6th of *June*; when, on a demand being made by one of the *Guntons*, the arbitrator having refused to deliver the filly, must, in effect, be taken to have said, "I cannot deliver the filly, because there is an award which seems to conflict with your claim." This is no conversion, but the result of a reasonable hesitation in a doubtful matter, and, as it is not suggested that the arbitrator was not acting *bonâ fide*, he is entitled to all the protection the law can afford him.

BURROUGH J. The arbitrator was not bound to deliver the filly to *Francis Gunton*, who was no party to the former action; his refusal, therefore, does not amount to a conversion.

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RICHARDSON J. The only question is, whether what passed on the 6th of *June* amounted to a conversion. The Defendant ought, perhaps, to have delivered the filly to *Benjamin Gunton*; but it does not appear that there was any request by *Benjamin*, or that *Francis* afterwards made another request, armed with *Benjamin's* authority. There was no refusal to deliver to the family of the *Guntons*, but only to *Francis Gunton* alone.

Rule absolute.

Feb. 8.

THOMSON v. ADAMS.

Under a bill of lading, by which goods were to be delivered "to J. A., nett proceeds paid to H. T., as per advice, or to his assigns, he or they paying freight for the said goods as per charter-party:" Held, that the freight was to be paid by J. A., and that H. T. was only entitled to what remained [after] such pay-

BY a bill of lading, certain oranges were to be delivered "to Mr. *John Adam*," (the Defendant) "nett proceeds paid to *Hugh Thomson*, Esq.," (the Plaintiff,) "as per advice, or to his assigns, he or they paying freight for the said goods as per charter-party." The Defendant sold the oranges, but the freight and other charges, amounting to more than the sum received on the sale, he paid nothing over to the Plaintiff, who, contending that, under the above bill of lading, the freight was to be paid by him the Plaintiff, sued the Defendant for the money received on the sale. At the trial before *Dallas* C. J. (*London* Sittings after *Michaelmas* term last,) the jury found a verdict for the Plaintiff, the learned Judge reserving it to the Defendant to move to set aside this verdict, and enter a nonsuit.

Vaughan Serjt. having, on a former day, obtained a rule *nisi* accordingly, on the ground that, under this bill of lading, the Plaintiff was not entitled to the nett proceeds of the oranges, till the freight had been paid by

by the Defendant, who, as consignee, was liable to be sued for it, 1821.

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Lens Serjt. now showed cause against the rule, and contended that the Defendant was consignee only for the purpose of sale, that the Plaintiff was the person really interested in the oranges, and liable to pay the freight; that the pronouns *he* or *they* in the bill of lading could only, grammatically or legally, refer to the last antecedent, which was *Hugh Thomson*.

Vaughan contrà was stopped by the Court.

DALLAS C. J. I felt no doubt at the trial, and feel none now; the only question is, which of these parties is to pay the freight? If the words "nett proceeds to *Hugh Thomson* or his assigns" had not been inserted in the bill of lading, it would have been quite clear, that *Adam* must have paid the freight. The effect of those words is, that the nett proceeds were to be paid to *Thompson*; but the nett proceeds are what remains after freight and other charges are paid.

The rest of the court concurring, the rule was made

Absolute.

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Feb. 8.

William Spittle *v.* Charles Lavender.

Where *A.* entered into and signed an agreement, as agent of *B.*, and *B.* shortly afterwards signed it with the words, "I hereby sanction this agreement, and approve of *A.*'s having signed it on my behalf:" Held, that *A.* was not personally responsible.

ASSUMPSIT on the following agreement: "An agreement had, made, concluded, and agreed upon this 15th day of *July* 1817, between *Charles Lavender* of *Elstow*, in the county of *Bedford*, auctioneer, as agent for and on the part and behalf of *Samuel Randall* of the same place, gentleman, of the one part, and *William Spittle* of *Pinner*, in the county of *Middlesex*, innholder, of the other part. First, the said *Charles Lavender*, in consideration of the sum of 1500*l.* to be paid by the said *William Spittle*, as hereinafter mentioned, doth hereby, for the said *Samuel Randall*, his heirs, executors, and administrators, and every of them, promise, by these presents, that he, the said *Charles Lavender*, his heirs and assigns, (and all and every other person and persons claiming or to claim any right, title, or interest under him or any other person or persons whomsoever of, in, or to the hereditaments and premises, hereinafter mentioned) shall and will, at the proper costs and charges of the said *Samuel Randall*, his heirs, executors, administrators, and assigns, on or before the 4th day of *October* next, make out and produce a good and clear title to, and at the costs and charges of the said *William Spittle*, by such conveyances, ways, and means in the law, as he, the said *William Spittle*, his heirs and assigns, or his or their counsel shall reasonably devise, advise, or require, and well and sufficiently grant, sell, release, convey, and assure to the said *William Spittle*, and his heirs, or to whom he or they shall appoint or direct, all that, &c. (setting out the property to be sold) with covenants to be therein contained, that the said premises, at the time of executing such convey-

ance,



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ance, are free from all incumbrances and demands whatsoever, and all other usual covenants; in consideration whereof, the said *William Spittle*, for himself, his heirs, executors, administrators, and assigns, doth hereby covenant, promise, and agree to and with the said *Charles Lavender*, his heirs, executors, and administrators, by these presents, that he, the said *William Spittle*, his heirs, executors, or administrators, or some of them, on having such good title made out and produced, and the said premises so assigned and conveyed to his heirs and assigns as aforesaid, shall and will, well and truly pay, or cause to be paid unto the said *Charles Lavender*, his heirs, executors, or administrators, as agent for the said *Samuel Randall*, as aforesaid, the aforesaid sum of 1500*l.* for the same in the manner following, (that is to say, &c.) but as the conveyance deeds will be executed on the 4th of *October* next, the said *William Spittle* is to execute a mortgage of all the aforesaid premises to the said *Samuel Randall* as a security for the sum of 500*l.* Witness their hands the day and year first above written.

(Signed) *Charles Lavender.*
Witness, &c. *William Spittle.*

I hereby sanction this agreement, and approve of *Charles Lavender* having signed the same on my behalf.

(Signed) *Samuel Randall.*"

Plea, *non assumpsit*, as to all but 150*l.* and a tender of that sum. Replication and issue. *Lavender* was an auctioneer employed to sell *Randall's* property. *Randall* was near at hand when *Lavender* signed the instrument, and himself signed it a few hours afterwards.

The only question in the cause being, whether, on this agreement, the Defendant was personally liable, the jury, at the *Middlesex* sittings after *Michaelmas* term, found a verdict for the Plaintiff, *Dallas* C. J. reserving to the Defendant the right of moving to enter a nonsuit.

Lens

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Lens Serjt. having, on a former day, obtained a rule *nisi*, accordingly,

Vaughan Serjt. now showed cause against the rule. The instrument must be construed according to the intention of the parties. It was clearly the intention of the Plaintiff to obtain the security of the Defendant's responsibility, as well as that of *Randall's*, and the Defendant intended to give that security; if it were otherwise, the instrument would never have been signed by the Defendant as agent, when the principal was so near, and signed himself so shortly afterwards. All the operative part of the instrument is in the name of the Defendant. And there is sufficient consideration for his consenting to become security for *Randall*; the Defendant was to make out the title, and the purchase money was to be paid into his hands, so that he might at once repay himself for his trouble. The Plaintiff would not have been justified in paying the purchase money to *Randall*, and is, therefore, compelled to sue the Defendant for the breach of the agreement. *Appleton* v. *Binks* (*a*), shows that one party may covenant for the acts of another; and *Burrell* v. *Jones* (*b*) is in point for the Plaintiff; in that case, one who undertook to pay as solicitor was held personally responsible: and there is no distinguishable difference between undertaking as solicitor and undertaking as agent.

Lens, in support of his rule, was stopped by the Court.

DALLAS C. J. The question is what was the intention of the parties, and that must be collected from the in-

(*a*) 5 *East*, 148. (*b*) 3 *B. & A.* 47.

strument,

strument, but by a reasonable exposition of the whole as it stands. In order to attain this, we must look to the character of the parties. *Lavender* is an auctioneer entrusted with the sale of an estate, belonging to *Randall*. Upon this sale, and in order to obtain a purchaser, he enters into an agreement, in consideration of the sum of 1500*l.* to be paid to him, but to be paid to him as agent of *Randall*. He does not agree for himself but as agent of *Randall*; and to make this appear the more clearly, *Randall* himself signs the instrument, the whole that passed forming only one transaction; considering, too, that *Lavender* was to gain nothing by the transaction, there can be no doubt that he entered into it as agent only. The cases cited do not apply. The first was the case of a covenant, and the Defendant covenanted for himself. In *Burrell* v. *Jones*, the Defendants engaged as *solicitors* of, not on behalf of the assignees, nor was their engagement followed up by any approbation of it on the part of the assignees.

PARK J. On the general rule of law, namely, that where the principal is known the agent is not liable, there can be no doubt; though it is true that an agent may, under certain circumstances, render himself liable at all events. But it is not merely because he calls himself an agent, that he can become liable, he must so frame the undertaking as to make his additional engagement clear beyond dispute. Here, the signature of the principal, and the sanction given to the act of the agent is conclusive, that he did not mean to implicate the Defendant. In *Appleton* v. *Binks*, the instrument was under seal, and the Defendant bound himself: here the Defendant only signed, and bound *Randall*, the vendor. In *Burrell* v. *Jones*, the Court expressly said, that the Defendant, as solicitor, had no right to bind the assignees. *Bowen* v. *Morris* (*a*) is in point for

(*a*) 2 *Taunt.* 374.

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the Defendant. Therefore, under all the circumstances of this case, a nonsuit must be entered.

BURROUGH J. This was all one transaction, and is no more than an agreement entered into by *Lavender* for *Randall*, carried to him immediately, and by him immediately signed and sanctioned. To the name of Lavender, the expression "as agent" is tacked for the very purpose of excluding any personal liability.

RICHARDSON J. I think there is some obscurity in a part of this instrument, but, taking the whole together, I agree with the rest of the court, particularly on referring to the sanction given by *Randall*, which was so soon added, as to render the whole but one transaction. By the head of the agreement, it is clearly expressed that *Lavender* acted only as agent, and further, that he agreed for *Randall*, his heirs, executors, and administrators; and this distinguishes the case from *Appleton* v. *Binks*. The whole confusion arises from the name of *Lavender* being afterwards inserted by mistake for that of *Randall*; he agrees that the said "*Charles Lavender*, his heirs, and assigns, and all and every other person and persons claiming or to claim any right, title or interest under him, or any other person or persons whomsoever, of, in, or to the hereditaments and premises," shall make a good title; and this mistake is more manifest from what follows, "at the proper costs and charges of the said *Samuel Randall*." The intent was, not that *Lavender* should make title, but that *Randall* should. After this, the principal sanctions the act of the agent, and there can be no doubt that the whole is one transaction. There must be a

Nonsuit entered.

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BOWLES and another *v.* PERRING.

Feb. 10.

Where the mortgaged estate of a bankrupt is sold under the order in Chancery of 8th *March*, 1794, at the request of the mortgagee, and the mortgagee is the purchaser at the sale, he is liable, in an action for money paid, to reimburse the solicitor under the commission the expences of the sale.

ASSUMPSIT for money paid. At the last *Dorchester* assizes, before *Graham*, B., a verdict was found for the Plaintiffs, subject to the opinion of the Court, on the following special case. *Richard Messiter*, being seised of a freehold manor and estate at *Shaftesbury*, mortgaged the same, in the year 1812, to the Defendant, for 7000*l.* In the year 1816, on a commission issued against him, *Richard Messiter* was declared a bankrupt, assignees were chosen, and the Plaintiffs were appointed solicitors to the assignees. At the time of his bankruptcy, *Richard Messiter* owed to the Defendant the above 7000*l.*, together with a considerable arrear of interest. In order to obtain his money, the Defendant, by his attorney, *George Score*, made application to the Plaintiffs, to learn when the next meeting of the commissioners of bankrupt would be held: a day was subsequently fixed, and the Defendant's attorney having been informed of the circumstances by the Plaintiffs, attended at *Bath* at that meeting, in order to obtain from the commissioners the necessary order for the sale of the estate mortgaged by *Richard Messiter* to the Defendant. The meeting was also attended by the Plaintiff's clerk, and the Defendant's attorney signed a memorandum, which, (after reciting the mortgage to the Defendant, the fact of the mortgage money and interest being unpaid, that the Defendant was desirous the estate should be sold, and the proceeds applied, in the first place, to the payment of the expences attending the sale, and of the money due on mortgage, with the interest,) prayed the commissioners to direct a sale accordingly. This they are enabled to do in such a case, by

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Lord *Loughborough's* order in Chancery, 8th *March*, 1794. The commissioners made the necessary order for sale, in which they directed the monies to arise from such sale to be applied, in the first place, in payment of the expences of their meeting preparatory to such sale, and attending such sale, and then in payment of the 7000*l.* and interest. In consequence of this order, an advertisement for the sale of the estate was drawn up by the Defendant's attorney, and was sent by him to the Plaintiffs to peruse, on the part of the assignees. Advertisements were afterwards inserted in the newspapers, and the Defendant's attorney was at the sale declared purchaser on behalf of the Defendant, for the sum of 4457*l.* The Defendant's attorney prepared a draft of conveyance, and sent it to the Plaintiffs for their approval, on the part of the assignees; the draft being ultimately approved of, the Plaintiffs procured its execution. The Plaintiffs proved the payment of 2*l.* 8*s.* for advertisements of sale, and 20*l.* 2*s.* for the attendance of commissioners.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover; if so, the verdict was to stand, but otherwise a nonsuit to be entered.

Bosanquet Serjt., for the Plaintiffs, argued, that under the order in Chancery, the Defendant was not entitled to the proceeds of the sale of the mortgaged estate, till the expences of that sale had been deducted. The whole proceeding being for the benefit of the mortgagee, the object of the order in Chancery was to throw the expence on him, and not on the creditors under the mortgagee's commission. It was the duty of the solicitors under the commission, to pay the expences of the sale, and had the estate been sold to any other than the Defendant, the purchase-money would have been

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paid to the Plaintiffs, or to the assignees, who could only have given the Defendant the residue, after deducting the expences: the Defendant could not elude the rule, or stand in a better situation, by purchasing the estate himself.

Pell, Serjt., for the Defendant, contended, with respect to 2*l.* 8*s.*, the expences attending the sale, that the Defendant, being already entitled to the estate by the mortgage deed, could not be called on to pay any thing on buying it in at the sale, the expences of which ought to be borne by the creditors under the commission, as they would have been benefited if the estate had produced more than the money lent on mortgage; and that there was no request, express or implied, by the Defendant, for the Plaintiffs to pay this money.

But the Court was clearly of opinion, that, under the order in Chancery, the Plaintiffs were bound to pay these expences, and, not having received the purchase-money for the estate, were entitled to demand re-payment of them from the Defendant. *Burrough* J. observing that the sale was for the benefit of the Defendant, as it enabled him, if the estate turned out to be insufficient to pay the mortgage-money, to prove the difference under the commission; that this mode of proceeding was more expeditious and beneficial than foreclosure, and that, at all events, the Defendant having adopted it, was bound to take it with all its incidents.

Pell also argued that the Defendant was not liable for the fees paid to the commissioners, as it did not appear that the meeting was held at the Defendant's request, or for his business specially.

PARK J. and BURROUGH J. (who said they had been commissioners of bankrupt for many years) entertained

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tained no doubt that the Defendant was under the finding of the jury, (which precluded the court from entering into the *quantum*) liable to reimburse the Plaintiffs these charges also, as every meeting of commissioners, in which the accounts of an individual were examined for his own benefit, constituted a special meeting as to that individual, although other business was transacted the same day. But,

DALLAS C. J. and RICHARDSON J., expressing a wish that the fact should be ascertained, whether the meeting in question was or was not at the express instance of the Defendant, and for his especial business; the Plaintiff, in order to end the cause, consented to abandon any charge for fees to the commissioners beyond what they would have been entitled to on a general meeting, and a verdict was entered for 5*l.* 8*s.*

Feb. 10.

CHILDS *v.* MONINS and BOWLES.

A promissory note, by which the makers, *as executors, jointly and severally, promise to pay on demand, with interest*, renders them personally liable.

ASSUMPSIT on a promissory note; counts for money paid, money had and received, and on an account stated. Pleas for *Monins*, first, general issue; secondly, *actio non*; because heretofore, to wit, on, &c., at, &c., the Defendants were the executors of the last will and testament of *Thomas Taylor*, deceased, and as such executors they made the promissory note mentioned, in the words following (that is to say), "*Ringwould*, 28th *December*, 1816, as executors to the late *Thomas Taylor*, of *Ringwould*, we severally and jointly promise to pay to Mr. *Nathaniel Childs* the sum of 200*l.* on demand, together with lawful interest for the

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same. *J. Monins, Phineas Bowles*, executors." The Defendant *Monins* further pleaded *plenè administraverunt præter*. Plea for the Defendant *Bowles*, general issue. Replication, joining issue with *Monins* on his first plea, and with *Bowles* on his plea. Demurrer to the second plea of *Monins*, for the following causes: that the Defendants have, by the note mentioned, made themselves personally responsible to the Plaintiff; and that the said Defendants have in and by the said note admitted, that they have assets in their hands for the payment of the said note; and that it does not appear that the said note was given for a debt of the said *Thomas Taylor*, but may have been given for a debt of the said executors, since the death of *Thomas Taylor*; and, for that, the Defendants have promised, in and by the said note, to pay the sum of 200*l.*, with lawful interest; and the said Defendants could not, in their representative capacity, become liable for the interest due on the said note; and, for that, the Defendants have become personally liable, because they have severally and jointly promised to pay, with interest, the sum in the said note mentioned; which note gives a right of action against the executors of one of the Defendants who shall first die, and on that event against the other Defendant, as the survivor; and the last-mentioned executor could not be liable, or sued as executor of *Thomas Taylor*; and that the second plea should have been pleaded in abatement, and not in bar; and that the second plea is in other respects uncertain, informal, and insufficient. Joinder in demurrer.

Taddy, Serjt., in support of the demurrer. The promise to pay is an admission of assets; and as the payment was to be made with interest, a payment at a future day must be implied. This constitutes a forbear-

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ance to sue on the part of the Plaintiff, which forbearance raises a sufficient consideration for the Defendants charging themselves. It has been expressly decided, that if an executor promises to pay the debt at a future day, it becomes his own debt, to be discharged out of his own estate. *Goring* v. *Goring* (a), *Trewinnian* v. *Howell* (b), 2 *Wms. Saund.* 137. b.

Vaughan Serjt., *contrà*. The executors are not personally liable, because they expressly promise as executors, not in their own right; and there is no sufficient consideration for a promise in their own right. The circumstance of the promise having been made in writing, does not alter the case; for the statute of frauds, in enacting that an executor shall not be personally charged, except by his own writing, has not enacted that even by such writing, he shall be charged in cases where he would not have been liable at common law. *Rann* v. *Hughes* (c). The promise to pay at a future day should, in order to charge the executor, be express, and not merely deducible by inference.

Taddy, in reply, was stopped by the Court.

DALLAS C. J. It has been urged that the Defendants cannot be personally liable, because this is only a promise to pay as executors. Whether or not the promise be such, must depend not on those words alone, but on the words of the whole instrument taken together; and what are they? "As executors to the late *Thomas Taylor*, of *Ringwould*, we severally and jointly promise to pay to Mr. *Nathaniel Childs* the sum of 200*l.* on demand, with lawful interest for the same." Take

(a) *Yelv.* 10.
(b) *Cro. Eliz.* 91.
(c) 7 *T. R.* 350. *n.*

first

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first the words "on demand:" suppose a demand had been made immediately; do not the executors by subjecting themselves to such a demand, admit they have assets to satisfy it? If they meant to limit their liability, why did they not add to the words *as executors*, the words "out of the estate of *Thomas Taylor*." But they promise absolutely, and further add an engagement to pay interest; when, therefore, by the engagement to pay interest they have induced the Plaintiff to suspend his clear and admitted demand, by so doing they make the promise personal and individual. The plea further says, they have fully administered, so they may have done at the time of plea pleaded; but they do not say they had no assets at the time the note was given. If executors were not liable on such a promise, they would be enabled, by making such a promise, to defraud any individual among their testator's creditors. This too is a promise, which, from the circumstance of interest being added, necessarily imports a payment at a future day, and an executor promising to pay a debt at a future day, makes the debt his own.

PARK J. concurred.

BURROUGH J. The plea is inapplicable to the Count. The insertion of the words "as executors" cannot alter the case, if, on the whole instrument, the parties appear liable. That is clearly the case in the present instance; for, by promising to pay on demand, the Defendants admit assets; and, by promising interest, they show in effect that the debt was to be paid at a future day; as they could not charge the estate of the testator with interest, they must pay it out of their own pockets.

RICHARDSON J. We must look at the whole instrument, not confining ourselves to the words "as executors;"

 and

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and from the whole instrument it appears that the Defendants are personally liable. They promise severally and jointly, which is not usual with executors. They promise to pay on demand, and with interest, which is clearly a compensation for forbearance. It may be true now, that they have fully administered, but that is no answer to the Plaintiff, who was entitled to be paid in 1816. *Goring* v. *Goring* is in point: but there are other cases, *Barry* v. *Rush* (*a*), *Worthington* v. *Barlow* (*b*).

Judgment for the Plaintiff.

(*a*) 1 *T. R.* 691. (*b*) 7 *T. R.* 453.

Feb. 12.

NICHOLL v. BROMLEY.

If the defeasance on a warrant of attorney state that it is given to secure the payment of a sum *on demand*, and, in case default shall be made, then judgment to be entered up and execution issue, an actual demand must be made; and a proposal to settle amicably does not amount to such a demand.

THE defeasance of the warrant of attorney in this case was as follows, " The within warrant of attorney is given by the within-named *W. Bromley*, to secure the payment of the snm of 1000*l.* on demand, and in case default shall be made, then judgment may be entered up hereon, and execution issue for the said sum of 1000*l.* or so much thereof as shall be then due, together with all costs," &c. The Plaintiff's attorney waited on the Defendant to induce him to settle matters amicably, which attempt having failed, he issued execution the next day.

Onslow Serjt. having obtained a rule to set aside this judgment,

Vaughan Serjt. shewed cause against the rule, and argued, that the expression " payment on demand" was only formal, as in a bond, and that the process of law was

was of itself a sufficient demand. At all events, the attempt to settle amicably amounted to an actual demand.

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But *the Court* thought it appeared from the stipulation, that execution should not issue till default had been made, that an actual demand was intended by the parties, and that no demand was shewn to have been made.

LEIGH v. SHEPHERD.

Feb. 12.

An avowry by one of several co-heirs in gavelkind in his own right, with a cognizance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs.

One of several co-heirs in gavelkind may distrain for rent due to him and his companions without an actual authority from his companions.

THIS was an action of replevin upon a distress for rent; and the questions, which were argued, arose on the fifth and seventh avowries and cognizances. By the fifth, the Defendant avowed in his own right, alleging, that *John Brenchley* and others held one undivided fourth-part of the premises, as tenants to the Defendant, at the yearly rent of 16*l.*, and that one undivided fourth-part of the 16*l.* of that rent, for one year was due and in arrear to the Defendant. By the seventh, the Defendant avowed in his own right, and made cognizance as bailiff of *Edward Shepherd*, *Henry Shepherd*, and *Frances E. M. Shepherd*; alleging, that the said *John Brenchley* and others held the premises as tenants to the Defendant, and the said *Edward*, *Henry*, and *Frances E. M. Shepherd*, at the yearly rent of 16*l.*, and that 16*l.* for one year's rent, was due and in arrear to them. The Plaintiff, by his plea in bar to the fifth avowry, denied the tenancy in manner and form, &c. By his first plea in bar to the seventh avowry and cognizance, he denied the tenancy in manner and form, &c.

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and by his second plea in bar to the same, he denied that the Defendant was the bailiff of the said *Edward*, *Henry*, and *Frances E. M. Shepherd*. By the special case, it appeared, that the estate was of gavelkind tenure; that *John Brenchley*, and others, held the same as tenants to one *Mary Shepherd* in her life time, at the yearly rent of 16*l*.; that, on her death, the estate descended to the Defendant, and the said *Edward*, *Henry*, and *Frances E. M. Shepherd*, as co-heirs in gavelkind; that the tenancy continued; that one year's rent was due at the time of taking the distress; and, that the Defendant was not authorised by *Henry Shepherd* to distrain for him, but was authorised by the other co-heirs.

The case was argued by *Blossett* Serjt. for the Plaintiff, and *Taddy* Serjt. for the avowant.

Arguments for the Plaintiff. There is a great difference between the rights of co-parceners and joint-tenants, as well with respect to the power of distraining, as in other matters; and though one joint-tenant may distrain for the whole rent, and, without showing authority from his companions, avow for the whole, the present avowant being a co-parcener, has no such right. A joint-tenant may distrain and avow for the whole, because he has a unity of interest with his companion, and an entirety in the whole estate, "*totum in communi, nihil separatim*" (*a*), he is seised *per my et per tout*; and though, in form, he should avow in his own right, and as bailiff to his companions, it is not his character of bailiff, but his character of joint-tenant, that entitles him to distrain (*b*). But the unity and entirety of interest which alone entitle the joint-tenant to distrain without the

(*a*) *Bracton*, Lib. 5. *tract*. 5. *c*. 26. *fo*. 430.

(*b*) Per *Holt* C. J., 5 *Mod*. 72., in *Pullen* v. *Palmer*.

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the authority of his companion, do not exist in the case of co-parceners; for though parceners constitute one heir, and have an entire possession as against strangers, they have separate interests, and distinct freeholds as against each other; one may infeoff the other; and if one dies, his share descends to his heir; there being no benefit of survivorship as with joint-tenants (*a*), one may be barred by the statute of limitations, while the other is saved by a disability (*b*). Mere *unity* of possession can no more entitle one parcener to distrain for his companion, than one tenant in common. It would be a great hardship too, if one parcener should, without the knowledge or consent of his companion, distrain; for the statute of limitations might operate before they came to an account, and the companion be deprived of all remedy. There is no authority directly in point, as all the cases from the year-book, 15 *H.* 7. *p.* 17. *pl.* 11., downwards, are cases of joint-tenants, not of parceners.

Arguments for the avowant. It is true that parceners have separate freeholds for some purposes, but these are only for the purposes of real actions, and making a feoffment, *Blackstone's Comm. B.* 3. *c.* 10. *p.* 149: in all possessory actions, they stand in the same condition as joint-tenants; and one has in most cases authority to act for the other, as in the case of an entry, 1 *Lutw.* 754. The case in the year-books is cited from *Brooke* by *Viner* (*c*), as applying to co-parceners, which at least shews what was the opinion of *Viner* on the subject. In *Stedman* v. *Page* (*d*), it is expressly said, that one

(*a*) *Co. Lit.* 164. *a.*

(*b*) 2 *Taunt.* 441. *Roe, d. Langdon,* v. *Rowlston.*

(*c*) 4 *Vin. Abr. Bailiff* D. *pl.* 4.

(*d*) 5 *Mod.* 141. *S. C. Carth.* 364.

co-parcener

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co-parcener cannot make an avowry for a moiety, but must avow in her own right and as bailiff to the other. To the same effect is *Stedman* v. *Bates*. (*a*). There is no hardship in allowing one parcener to distrain for the whole, because his companions may claim their shares of him, and if they cannot trust each other, they may have partition. On the other hand, if they were deprived of this power, the tenant would be subject to the inconvenience of several distresses.

Argument in reply. It does not appear from *Stedman* v. *Page*, or *Stedman* v. *Bates*, that the avowant is entitled to avow as bailiff, without the authority of his co-parcener for so doing; it is only laid down generally, that the avowry ought to be joint, which may be readily admitted, provided the parties agree together.

DALLAS C. J. now delivered the judgment of the Court, and, after stating the pleadings and facts of the case as above set forth, proceeded as follows: Upon the argument the learned counsel for the Defendant has not much insisted upon the fifth avowry: and the case of *Stedman* v. *Bates*, (reported in 1st *Ld. Raym. Rep. p.* 64., and other cotemporary reporters,) and the principles of law on which that case proceeded, are decisive against that avowry. It is not true, as therein alleged, that the tenants held one undivided fourth-part of the estate as tenants to the Defendant, the law considering the tenancy to be a tenancy of the whole, held under the four parceners as forming one heir. There is no difference in this respect between parceners at common law, and co-heirs in gavelkind,

(*a*) 1 *Ld. Raym.* 64.

the

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the latter being only parceners by custom, and so considered by *Littleton* (*a*).

The principal question argued has been, whether one of several parceners has a sufficient authority in law, by reason of his interest in the rent, to make cognizance, as bailiff, of his co-parceners, without any actual authority given by them.

No decided case has been cited on this point; but a *dictum*, in the year book of 15 *H.* 7. (*b*), has been relied upon, where it is said, that "if two men have a joint rent, and, the rent being in arrear, one distrain, and the tenant bring replevin, he ought to make avowry and cognizance as bailiff of his companion; and because he has an interest in the rent, his being bailiff is not traversable." It has been observed on the part of the Plaintiff, that this *dictum* applies rather to joint tenants than to parceners: but it is remarkable, that Lord C. J. *Brooke*, in his *Abridgment* (*c*), cites it as applying to parceners; and it appears to us to be equally applicable to both; for both have a joint rent, there being in both cases but one rent; and each parcener, as well as each joint tenant, is interested in that joint rent.

In this view, the case of *Pullen* v. *Palmer* (*d*), which was a case of joint tenants, becomes a considerable authority, where it was held, that one joint tenant cannot avow for the whole rent; but it was laid down by Lord C. J. *Holt*, that he may distrain for the whole, but must avow in his own right, and as bailiff to the rest, and that he may distrain for the whole in point of interest, and needs no authority from the rest to distrain, but may do it by law. And in the same sense, we think is to be understood the *dictum* in *Page* v. *Stedman* (*e*), "that when one parcener distrains, she must avow in her

(*a*) *s.* 241. and *s.* 265.
(*b*) 17. *a.*
(*c*) *Traverse*, 118.
(*d*) 5 *Mod.* 72.
(*e*) *Carth.* 364.

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her own right, and also as bailiff to her sister for the entire rent," namely, that she may do so without any express authority from her sister.

It is not necessary to decide, whether the authority which the law gives to each joint-tenant and parcener, in point of interest, to distrain and avow for himself and the rest, is such an authority as the others could not countermand, if they should think proper so to do. It is sufficient that no such countermand or express dissent appears in this special case, but only an absence of express authority. This we think immaterial, inasmuch as the law gives the necessary authority, which is sufficient to support the allegation contained in the seventh avowry and cognizance, that the Defendant was bailiff of his three co-parceners. The rent, when recovered will, of course, be received by the Defendant for the equal benefit of his three co-parceners, as well as of himself.

Judgment for the Defendant.

REGULA GENERALIS.

(*Hilary Term*, 1821.)

Whereas, by the common consent rule in actions of ejectment, the Defendant is required to confess lease, entry, and ouster, and insist upon his title only. And whereas, in many instances of late years, the Defendant in ejectment has put the Plaintiff after the title of the lessor of the Plaintiff has been established, to give evidence that such Defendant was in possession (at the time the ejectment was brought) of the premises mentioned in the ejectment, and for want of such proof, has caused such Plaintiff to be non-suited. And whereas such practice is contrary to the true intent and meaning of such consent rule, and of the provisions therein contained

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REGULA GENERALIS.

tained for the Defendant's insisting upon the title only. It is therefore ordered, that from henceforth in every action of ejectment, the Defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the Defendant (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises; and that if, upon the trial, the defendant shall not confess such possession, as well as lease, entry, and ouster, whereby the Plaintiff shall not be able further to prosecute his suit against the said Defendant, then no costs shall be allowed for not further prosecuting the same, but the said Defendant shall pay costs to the Plaintiff in that case to be taxed.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

END OF HILARY TERM

CASES

ARGUED AND DETERMINED

IN THE

1821.

Court of COMMON PLEAS,

AND

OTHER COURTS,

IN

Easter Term,

In the Second Year of the Reign of GEORGE IV.

(IN THE HOUSE OF LORDS.)

SMITH *v.* DOE, dem. Earl of JERSEY and Others.

May 18.

Devisee for life, with a power enabling her, in consideration of marriage, to revoke the uses limited to her, and to appoint to such uses, and with such powers and provisoes, and in such manner as was by her afterwards done, by a deed of settlement, in consideration of marriage, revoked the uses, and appointed the lands, to hold to the use, after the marriage, of her husband for life, *sans* waste; and after his decease, to the use of herself for life, *sans* waste; with remainder to divers other uses, for the benefit

A WRIT of error having been brought to reverse the judgment given in this case by the Court of Exchequer Chamber (*a*), the Plaintiff in error prayed that

(*a*) Vide *ante*, Vol. I. p. 97.

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that the judgment of that court might be reversed, and the former judgment of the Court of King's Bench in his favour might be affirmed; for the following among other REASONS.

1st. Be-

benefit of the issue of that marriage, and also of the issue of the appointor; remainder as she should by will appoint, with remainder to the use of herself in fee. The settlement contained a power for the husband and wife, from time to time, when in possession of the premises so limited to them for their lives, by indenture to demise such premises as then were leased for lives, or for years determinable on lives, to any persons, in possession or reversion, for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be determinable on the dropping of three lives; and so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more; or as great or beneficial rents, duties, and services, or more, or a just proportion of such ancient or the then reserved rents, &c. (except heriots, which might be varied at will); *and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved:* and also, by indenture to demise any of the premises for any term absolute, not exceeding 21 years, in possession, and not in reversion; so as there were reserved so much, or as great and beneficial yearly and other rent and rents, and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same, without taking any fine; and so as in every such lease there were contained a clause of re-entry, in case the rents reserved were unpaid by the space of 28 days: and also, by indenture to demise any of the premises wherein or whereupon any mine or mines should be open, or any person should be willing to open any mine, for any term not exceeding 31 years in possession, so as upon every such lease there were reserved such share of the produce, or such yearly rent, as could reasonably be obtained without taking any fine; and so as the lessees were not by any express clause freed from impeachment of waste, other than in the necessary and reasonable working thereof; and so as there were inserted such proper and usual covenants for the effectually winning and working the mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature.

The lands in the declaration mentioned had been and were leased, and were under and subject to a lease, for a term of years determinable on lives. The husband, after the marriage, by indenture, in consideration of the former lease and of 105*l.*, and of the yearly rents, duties, payments, services, articles, covenants, provisoes, and agreements thereinafter specified and reserved on the part of the lessees, demised the lands in question for 99 years, if three or either of them should so long live, paying the yearly rent of 2*l.* by equal portions, at *Michaelmas* and *Lady-day*, with a couple of fat capons, or 1*s.* 6*d.* in lieu thereof, at the election of the lessor; and also an heriot of the best beast, or 40*s*, in lieu thereof, upon the death of every tenant dying in possession; and the like upon every assignment, sale, forfeiture, or alienation; and also the lessees yielding and doing constant suit of mill, paying such toll and multure as others grinding their corn there should pay. The lease contained a covenant by the lessees to pay the yearly rent of 2*l.*, and the duties, heriots, suits, services, and other reservations, at the time and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof; with a proviso, that *if at any time the rent of* 2l., *and every or any of the duties, services, reservations,*

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1st. Because the intention of the donor of a power is to be collected from the whole of the deed whereby that power is created; from the plan and design of it as well as the words, and also from the circumstances of the property which is by him subjected to the operations of that power; and in the construction of the particular instrument executed under such power, the law will expound it, with an inclination to preserve rather than to destroy the instrument; "*ut res magis valeat quam pereat.*" See *Cother* v. *Merrick* (a). "It is the office of a Judge to preserve, not to destroy an estate."

2d. Because the only objection raised to the lease, under which the Plaintiff in error holds, is, that the proviso for re-entry therein contained is not such as is required by the leasing power under which it was granted by Lord *Vernon*, as not being absolute, unconditional, and capable of being enforced *instanter* upon every default of payment of rent, on the very day on which such default takes place; but the words of the power do not, as the Plaintiff in error submits, require a proviso for re-entry absolute, unconditional, and capable of being enforced instanter, such words being only "so as there be contained, in every such lease, a power of re-entry for non-payment of rent." It is undoubtedly a condition

reservations, and payments thereby reserved, or any part, should be unpaid or undone by 15 days next over, or after any of the times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises; or, if the lessees should leave the premises in decay six months after view had and notice given, or should commit any wilful waste, or grind their corn at any other mill (the lessor's mill being in repair); or if the lessees should assign without license, or if any default should be by the lessees made in the payment or performance of all or any of the reservations, covenants, and agreements thereinbefore on their parts contained, *then the lessor, and the person to whom the freehold of the premises should belong, might re-enter.* Upon the trial of an ejectment, evidence was received that the usual and accustomed form of leases of the estate contained in the marriage settlement, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in this indenture.

Held, that the clause of re-entry in the lease pursued the form required by the leasing power.

2. Held, that the evidence of the former leases was well received.

(a) *Hardr.* 93., *per Parker* Baron.

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precedent to the due execution of the leasing power, that there should be reserved in all leases granted under such power, "a power of re-entry for non-payment of rent;" but in what terms that power of re-entry is to be reserved, the settlement is wholly silent, and the argument for the Defendant in error is, that from the non-expression of any terms in which that proviso is to be framed, it necessarily results, that the comprehensive expression, "a power of re-entry" (which comprehends and includes every proviso of re-entry adapted to the object for which it is required) must be narrowed to one particular proviso for re-entry, absolute, unconditional, and capable of being enforced *instanter* upon every default. But, it is submitted, the expression "a power of re-entry," is no description of the particular form, though it is of the general object of the condition to be introduced into the lease, and that the language of the leasing power is fully satisfied by a proviso for re-entry such as is contained in the lease now sought to be set aside by Lord *Jersey*, which, though not an absolute, unconditional proviso, and capable of being enforced *instanter* upon every default, is nevertheless "a power of re-entry" sufficient for the object for which it was required, such as was in use upon the estate to which the leasing power applies at the time it was created, and such as the general term used in the leasing power, so far from either expressly or impliedly disapproving, seems advisedly to sanction, especially when it is recollected, that in a subsequent part of the same leasing power, as applicable to the rack-rent estates, the donor of the power omits the general and larger term, "a power of re-entry for non-payment of rent," and specifically chalks out the very power to be introduced into such leases, *viz.* "a clause of re-entry, in case the rent to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively

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appointed for payment thereof." Thus, in this latter case, where large rents were to be secured, defining the extent of indulgence to the tenant, and furnishing the very clause to be introduced, as contra-distinguished from the more general and comprehensive expression previously used. *viz* "a power of re-entry for non-payment of rent;" can it be successfully contended, that this expression conveys a perfect idea to the mind, of the nature and form of the power of re-entry required? It points out, indeed, distinctly the wish of those who framed the settlement, that there should be some power of re-entry in all cases of this description, but not the precise terms in which such power shall be reserved. Had the power required a covenant on the part of the lessee, to build a house upon the premises, it would still have been a question—what house; and a lease stipulating for the building a house of given dimensions, and within a prescribed time, must have been judged of by the law as a reasonable or unreasonable compliance with the condition.

3d. If the language of the leasing power has been literally attended to in the lease executed under such power, the next consideration will be, whether the spirit also is preserved, or whether there be any thing in the plan and design of such leasing power, and the circumstances of the property to be leased, which, by disclosing a different intention in the donor of the power, from that which occurs on the mere reading of the words themselves, thereby imposes a different construction upon such words. The leases under the power are of three sorts. First, leases for lives, or determinable on lives which are renewable on fines, and where the rents reserved are nominal; secondly, leases for years, where a rack-rent is reserved; and thirdly, mining leases, in which no reservation of a powor of re-entry is required.

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The lease in question is of the first sort, and the proviso, therefore, for re-entry, rather introduced with a view of enforcing regular acknowledgments of the tenancy, than of securing a succession of large payments at stated periods. It is not improbable, therefore, with such an object, that some discretion should be left to the person by whom the power was to be executed, as to the form of the proviso. If the words of the leasing power allow such discretion, is there any reason on which its exclusion can be founded? Is the security of the nominal rents endangered by it? Are the acknowledgments of a subsisting tenancy less likely to be regular in a case where the property of the tenant, if hazarded by irregularity, is hazarded to so great an extent as that of the loss of a valuable lease for lives held under a nominal rent, than where it consists only of a short term at a rack-rent? On the contrary, considering that two objects must have been present to the mind of the framer of the leasing power; first, the securing the rents to those who were to benefit by them: second, the preservation of the estate in good condition when the lease determined; has not the language of the power been designedly varied, when directing the reservation of the right of re-entry in the two sets of leases? In the leases for lives, where a small proportion of the annual value is to be paid in the shape of rent, and where a distress might be resorted to without injury to the estate, a mere reservation of the right of re-entry is required, in such manner and form as should be found discreet and beneficial, and adapted to the object in view; but in the rack-rent leases, a precise and well defined clause of re-entry is pointed out, because the interest of both tenant for life and remainder-man is materially consulted, in the reserved power of re-possessing themselves of land, for which the lessee is not able to pay the rack-rent within twenty-eight days from

from the time of its becoming due, and where a distress taken for such rent, if resorted to, would probably not secure the rent, but certainly injure the cultivation of the estate.

4th. Because, if the literal language of the condition be not violated, and there be nothing in the spirit of the leasing power, giving a meaning beyond the words used, the principle which has hitherto governed in cases of this kind must govern in this case, which is, that where a special clause of re-entry is prescribed by the power, that clause cannot be departed from, even in trivial circumstances, without defeating the lease made under the power; the donor of the power being in this respect the legislator, and having a right to impose any condition precedent he pleases, provided it be not inconsistent with law, and which when once plainly expressed by him, is not subject to any examination of its reasonableness or unreasonableness. But, if no special clause be furnished by him, but merely a direction given that certain leases shall contain "a power of re-entry," then, if a clause reserving the right of re-entry be inserted, the will and direction of the legislator is complied with, unless the power be executed in a fraudulent or illusory manner, which neither law nor equity would hold to be any compliance at all. Such is the true result of *Coxe* v. *Day* (*a*), explained as that case is by the subsequent decision in this case, when in the Court of King's Bench, of two of the same learned Judges who signed the certificate in *Coxe* v. *Day*; for in the last-mentioned case, the power having prescribed a particular clause, that is, in the event of the rent being behind a specified number of days, those learned Judges held a proviso for re-entry, which added terms

(*a*) 13 *East*, 118.

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not used in the particular clause prescribed by the power, to have vitiated the lease. But, in this case, the settlement only requiring "a power of re-entry for non-payment of rent," and the lease containing the clause of re-entry in question, they considered the words of the power to have been complied with, such compliance being not only literal, but not impeachable on the ground of any fraud or contrivance, and, on the contrary, fair and reasonable.

5th. In considering whether the lease be bad on the ground of any excess in the indulgence given to the tenant, where the power, as in this case, prescribes no precise clause of re-entry, it is most material to ascertain what was the indulgence granted in leases of this estate, prior and subsequent to the settlement creating this power. No such enquiry, it may be safely conceded, can be admitted, where the precise clause is prescribed by the power; but where the power is silent as to the particular nature of the condition, if, as it is humbly contended, it follows from thence that some discretion is to be exercised by him who executes the power in framing the condition, the discretion heretofore sanctioned by her, who, if she had spoken, must have been obeyed, is fit evidence to guide the judgment where she has been silent. It seems difficult to maintain by argument, that where, by the terms of the condition, reference is made to prior leases impliedly, as where "ancient" or "accustomed" rents, or rents "as beneficial as the ancient rents," are spoken of, such evidence is not admissible, to ascertain either the propriety of the new rents, as compared with the old rents in amount, or the propriety of the mode in which they are reserved or secured, as compared with the ancient mode of reserving or securing them. But it is said, there is no implied reference in the very words

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directing the reservation of the power of re-entry. If, however, the words "a power of re-entry for non-payment of rent" embrace every power of re-entry, properly so called, then some assistance is necessary to ascertain what particular power of re-entry should be introduced, and none better can be had, than that which the leases prior and subsequent to the settlement furnish, as directing the will of her whose will alone is to be consulted on the occasion; and, though it is clear that her will of to-day cannot be contradicted by her will of yesterday or to-morrow, yet it is equally clear, that those who contend that such will must be the sole guide, must be content to find it elsewhere, if they cannot find it in the power itself; for, however general the power in its terms, it seems not more repugnant to reason to contend, that the execution thereof is thereby left absolutely to the tenant for life, since that would destroy the condition altogether, than to contend that the very generality of the words confines its execution to one, and one only form of proviso for re-entry, and that of the narrowest and most limited form. But upon sound reasoning it must be conceded, that in such case the limit to the exercise of discretion by the tenant for life must be sought for, either in the arbitrary rules of law, or in such facts as are fit to regulate the decision of the law; and as in the same power, for a different object, *viz.* the reservation of the rent, the settlor has himself impliedly referred to former leases, why may he not be considered also in this particular, as referring to former leases, and therefore framing the power in general terms? Either that must be the conclusion, or some more unsatisfactory source of evidence must be introduced, or there must be no limit to the discretion of the tenant for life, or the power must be narrowed to something less than its terms, by some supposed will of the settlor, not evidenced either by his words or his acts. The

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the law and no more: If it be applicable only to cases under the statute, then, by analogy thereto, this leasing power is reasonably executed, being qualified in its execution by what the law of the land has deemed reasonable, and being, from the terms in which it is penned, open to such qualification.

R. GIFFORD.
CHRIST[R]. PULLER.

The Defendant in error submitted that the opinion and judgment of the Court of Exchequer-Chamber were right, and according to law, and that the same ought to be affirmed, and the original judgment in the Court of King's Bench reversed; for the following, among other REASONS:

1st. Because the leasing power in the marriage-settlement of 1757 (a power granted by a person having the absolute dominion of the fee to a purchaser of a life-estate) expressly requires that the lease shall contain "a power of re-entry for non-payment of the rent thereby to be reserved;" which makes it necessary, it is submitted, that the right to re-enter should attach immediately on the rent being unpaid; whereas the lease, under which the Defendant in the ejectment claims, postpones the right of re-entry for fifteen days after the day of payment; thus depriving the reversioner of a part of that benefit, which, by the condition annexed to the leasing power, was intended to be secured to him. If such postponement be allowed for fifteen days, why may it not be allowed for thirty, forty, a hundred, or any other number of days so great as to make the power of re-entry nearly or quite unavailing? Where is the line to be drawn? If it be allowable to deprive the reversioner of any part of that right of re-entry which the creator of the leasing power says he

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shall have, of what part may he be deprived? It is submitted, that only two lines can be drawn, either the tenant for life is obliged to reserve the whole right of re-entry, or no part of it. And, as it is conceived, that the latter rule cannot be supported, it follows that the right of re-entry in the lease should be fully commensurate with that required by the leasing power, and that this lease is void as an execution of that power.

2d. Because the lease in question is liable to the further objection, that the leasing power requires that the lease shall contain "a *power* of re-entry *for non-payment of the rent thereby to be reserved*;" whereas the lease contains no such power, but only gives the lord a right to re-enter for the absence of distress for rent unpaid. The meaning of the words of the leasing power is perfectly plain and unequivocal; "a power of re-entry," it is conceived, means something enabling a man to re-enter, and "a power of re-entry for the non-payment of the rent" signifies something enabling a man to re-enter on the occasion, or for the cause of non-payment of rent; now the leasing in question certainly does not enable the reversioner to re-enter on such occasion, or for such cause; inasmuch as the whole rent for any number of years may be unpaid, and yet he may not be enabled to re-enter. See the case of *Coxe* v. *Day* (a), where this point was expressly decided.

3d. It is said in support of the lease, that the creator of the power has used very general language, that *a* power is required, without saying what power; and that the power of re-entry in this lease is sufficient, because it is a reasonable power, and was usual on the estate. It is true, the language of the leasing powers is general;

(a) 13 *East*, 118.

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so general, that only one quality is specified, which the power of re-entry is required to have, that it should be for non-payment of rent; but the creator of the power having exacted this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The leasing power requires that the power of re-entry should be for non-payment of rent, and it does not require that it should be usual or reasonable; why, then, should the leasing power be so construed as to dispense with the former condition, which, by its terms, is annexed to his execution, and to exact a compliance with the latter, which is not so annexed. Besides, it is not found that this conditional clause of re-entry is reasonable, or that it is usual generally; it is only found to be usual on the estate, which is not only, not the same thing as usual generally or reasonable, but may be the direct contrary. The generality of the word *a* (relied on in support of the lease) must certainly exclude a reference to any particular class of clauses of re-entry, such as those on this estate; as nothing can be more opposite to a general word than a word of reference. If this leasing power be construed to require the power of re-entry usual in cases of the lands comprehended in the settlement, although in this particular case this construction will operate to the advantage of the lessee, yet it may in other cases be productive of the greatest inconvenience to him. Suppose a lease under a power, in the terms of this leasing power, to be on the face of it conformable to the power, yet, if this construction prevail, the reversioner will have a right to avoid the lease, if he can shew that the clause of re-entry is different from that which is usual on the estate comprehended in the leasing power. The inconvenience to both parties will be extreme, if a lessee cannot be sure that he has a valid lease, by comparing his lease with the power, without inspecting all the

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leases formerly granted of lands within the same estate. It is submitted, that what the creator of a power has required, must be done, for this one reason, of itself sufficient, that it is required, and that it is a much safer rule to adhere to that condition which is expressly annexed to the execution of a power by one who has all the circumstances of the property before him, and who has the right to enlarge or narrow the power to any degree, than to substitute for what he has exacted, something which it may be conjectured he ought to have exacted, but has not.

4th. Because the power of re-entry in the lease is not only different from that required by the leasing power, but much less beneficial to the reversioner. Under an absolute power of re-entry, the reversioner would be entitled to succeed in an ejectment, on proving the rent in arrear, a demand made, and the execution of the counterpart of the lease by the Defendant. Under a power to re-enter on failure of distress it would be necessary for him to prove, that he had searched every part of the premises demised, and that no distress was to be found, (*Rees* v. *King* (*a*),) a matter of extreme difficulty where the rent is small and the premises extensive. A conditional clause of re-entry, which may be an adequate remedy in the case of high rents and lands of small extent, becomes quite insufficient when the rent is small, as is usually the case with ancient rents, and the lands demised of considerable extent. And, as the absolute power of re-entry becomes the more necessary for the lord, in case of small rents for large property, so it becomes the less inconvenient for the tenant, who might have some difficulty, and expect some indulgence to raise a large sum, but can have none

(*a*) *Forrest*, 19.

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in being ready with a small one. It is indeed universally true, that in order to secure a small demand the remedy should be more summary and less expensive than is requisite to enforce a large one.

5th. Because it is submitted, that the finding of the jury that the usual and accustomed form of leases of the estate contained in the marriage-settlement, was with a conditional proviso of re-entry, ought not to be taken into consideration in deciding this case. The words of the leasing power are, "A power of re-entry for non-payment of the rent thereby to be reserved;" they contain no reference to the former practice of leasing the estate, nor is there any fact stated on the special verdict, which raises any ambiguity in them; and it is submitted, that a provision contained in a written instrument, may not be explained or construed by any extrinsic matter, except in two cases only; first, when the provision refers to extrinsic matter: secondly, when its terms contain a latent ambiguity, that is, when in consequence of some matter of fact shewn by evidence, it appears that the language of the instrument has more meanings than one, neither of which is the case with the clause in question.

6th. Because, even supposing the former practice on the estate might legally be taken into consideration, it is far from affording any inference favourable to the lease in question. It is not found that the former leases were granted under similar powers. There is nothing to shew that the creator of the power was not dissatisfied with the former clauses of re-entry, and did not insert the provision in question for the very purpose of introducing a new one, which might well be, for the reasons stated above. And this is the more probable, because the leasing power, in several instances, expressly refers to

to the former practice on the estate, where it was intended that the tenant for life should be guided by it; there is no such reference in the clause relating to powers of re-entry; the inference is, that the practice was not intended to prevail with respect to powers of re-entry.

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J. Jervis.
W. H. Maule.

The case was argued at the bar of the House of Lords on the 19th, 22d, and 26th of *June* 1820, by *The Attorney-General* and *Puller* for the Plaintiff in error, and by *Jervis* and *W. H. Maule* for the Defendant in error, when the Lord Chancellor proposed the following question for the opinion of the Judges:

Whether, having due regard to the true intent and meaning of the indenture of the 2d *July* 1757, according to the legal construction of the several parts of that indenture as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th *September* 1803, as the same is stated in the special verdict, is for any and what reasons invalid?

There being a difference of opinion on the Bench, the twelve Judges, on the 16th and 18th of *May*, delivered their opinions *seriatim* as follows; and, on the latter day, the Lord Chancellor and Lord *Redesdale* delivered their opinions.

Richardson J.

RICHARDSON J. The case of *Smith against Doe on the demise of the Earl of Jersey and Others*, now pending by writ of error in this house, is an action of ejectment brought in the King's Bench, on the demise of Lord *Jersey* against *Smith* for the recovery of certain lands in the county of *Glamorgan*. These lands by indenture bearing date the 5th day of *September*, 1803, were

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demised by Lord *Vernon* to *Smith*, and another person since deceased, for three lives at a rent of 2*l.* payable half yearly at *Michaelmas* and *Lady-day*. And Lord *Vernon* the lessor was at that time tenant for life in possession of the estate, whereof the lands in question formed part, by virtue of a settlement duly made on occasion of his marriage with *Louisa Barbara Mansel*, bearing date the 2d day of *July*, 1757. On the trial of this action, the jury found a special verdict, on which the Court of King's Bench gave judgment for the Defendant; which judgment was reversed on writ of error in the Exchequer Chamber: and the cause having been brought by another writ of error before this house and argued at the bar here, your Lordships have proposed the following question for the opinion of the judges. (Here the learned judge stated the question.) I am of opinion that the lease of 1803 is invalid, because I think it is not made in conformity with the leasing power contained in the indenture of 1757.

The leasing power for that class of leases, of which the lease in question is one, requires that "there be contained in every such lease, a power of re-entry for non-payment of the rent thereby to be reserved:" and the question resolves itself into this,—what is the true construction of these words?

In order to decide this, I must first consider, whether the words themselves import and convey any distinct meaning: and I think they do; I think they mean, that the lessor should have power to re-enter if the rent reserved should not be paid according to the reservation.

One test, and, I think, a fair one, whether such meaning is conveyed by the words of this power, would be to insert in a lease a proviso for re-entry, expressed as nearly as possible in the very words of the power itself, and then to consider what construction a proviso so expressed would require, and whether the meaning would

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would be sufficiently distinct to be capable of being enforced by a court of justice.

Suppose, then, in the lease of 1803, it had been provided, that it should be lawful for the lessor or person entitled to the rent, "to re-enter for non-payment of the rent hereby reserved." In that case would the person entitled to the rent have been empowered to re-enter, if the rent had not been paid on the days of reservation? It seems to me, that he would have been so empowered; and *that* without any delay or condition other than the previous demand required by the common law: for all that he would be bound to prove, in order to justify and enforce his re-entry, would be, that there was *a non-payment* on demand of the rent reserved by the lease.

If this be so, it seems to me to prove that the necessity of waiting fifteen days, and the necessity of providing a deficiency of distress on the premises imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power.

It has been said, that the leasing power requires only "*a* power of re-entry," much stress having been laid on the indefinite effect of the article *A*; and it has been further said, that, though such power of re-entry is to be "for non-payment of the rent," yet, that the words "*for* non-payment," are not equivalent to "*on* non-payment," but only point at the purpose or object of the power of re-entry, namely, that of securing the payment of the rent.

It appears to my mind, however, that, although the article *A* be indefinite, yet it cannot, in just construction, extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shewn they do) a distinct and definite meaning. In this sentence, the word *A* seems to me neither to add to nor to qualify the meaning; but, that the

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meaning would have been the same, if that word had been wholly omitted, and the sentence had stood thus, "so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." And, as to the observations made on the meaning of the words "for non-payment of the rent;" although it is true, that the word "*for*" does often import the purpose or object, (and so it might here, if the words had been "a power of re-entry *for payment* of the rent:") yet the same word "for," as often imports the cause or occasion of that which is predicated; and such I think is its import here, where the words are "a power of re-entry for *non-payment* of the rent," meaning on occasion of the *non*-payment.

If the words of this leasing power import, as I conceive they do, by themselves, a distinct and definite meaning, I think it follows, that the fact stated in the special verdict respecting the usual and accustomed form of leases of the estate mentioned in the marriage settlement, can have no legal effect on the construction to be put on these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject matter. The words of this leasing power in that part which respects the clause of re-entry, seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic; although some former parts of the same leasing power do import such reference, namely when it is required, that the lands to be leased for lives, should be such lands as were in lease for lives at the time of making

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the settlement, and that the rents to be reserved, should be the ancient rents, or rents as great and beneficial.

I admit that a court is bound to look at every part of a written instrument, in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows, because this settlement, in respect of the rack-rent leases, expresses that the tenant is to be allowed 28 days for payment, that, therefore, it was intended, in respect of the leases for lives, to give a similar or any allowance of time, which is not only not expressed, but which appears to me, to be at variance with what is expressed.

Supposing, however, it were possible on this ground to get rid of the objection made against the lease of 1803, in respect of the allowance of 15 days; another and still more decisive objection remains, namely, that this lease fetters and confines the power of re-entry to such cases only, where there is a want of sufficient distress; a condition which appears to me, to be equally inconsistent with the power applicable to leases for rack-rent, and to that which is applicable to leases for lives.

The case of *Coxe* v. *Day* (*a*), which I think was rightly decided, appears to me to be in point, and I cannot draw any distinction, which is satisfactory to my own mind, from the circumstance that the leasing power *there*, allowed a period of 21 days for payment, whereas the leasing power *now* under consideration as to the leases for lives, expresses no such allowance. It is true, that in *Coxe* v. *Day*, the case of *Hotley* v. *Scot* (*b*) does not appear to have been cited; and it seems that, in the last mentioned case, a similar objection taken to a lease granted under a power was over-ruled by the Court of King's Bench: on what ground the Court pro-

(*a*) 13 *East*, 118.

(*b*) *Lofft.* 316. *S.C.* Mr. *Butler's* MSS., see note (*a*), p. 498.

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proceeded, we are not apprized, and being obliged now to make an election between the two authorities, I must express my concurrence with that of *Coxe* v. *Day*.

It has been suggested, that the statute of 4 *G.* 2. *c.* 28., though professedly made for the benefit of landlords, does, in effect, take away their right of re-entry at common law, and confine them in all cases to the statutable remedy thereby given, which remedy can never be exercised without proof, that no sufficient distress was to be found on the demised premises, countervailing the arrears then due. And I think it must be admitted, that the construction of the statute, if it be the true construction, furnishes a sufficient answer to the second objection made to the lease of 1803; for, in that case, the lease has only expressed that which, whether expressed in the lease or not, the statute law has provided.

But I cannot think that this is the true construction of the statute. The object of the statute, as appears to me, both from the recital and the enactments, was to relieve landlords from certain inconveniences, to which they were subject by the law as it then stood, and to give them certain remedies, to which they were not before entitled; but not to deprive them of any remedies or rights, to which they were already entitled by law. It contains no negative or prohibitory words, which, I think, would obviously have been inserted, if the intention had been to deny to the landlord the future exercise of any ancient right; and it would, as it strikes me, be a strange construction to hold, that the words apparently intended for the landlord's benefit do, from their generality, operate to extinguish any of his ancient rights; when, if such had been the intention, it would have been so easy and so obvious to express it. That such, however, was not the intention, I think manifestly appears from this, that, whenever the new mode of proceeding

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ceeding in ejectment given by the statute is pursued, the statute declares, that "then and in every such case, the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute; and thereby shews, that the old mode of proceeding was intended to be left as it was, although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute; and, although I am not able to point out any case, where it has been expressly decided, that the statute does not take away the landlord's remedy at common law; several cases have occurred where landlords have so proceeded without objection on that ground, and it has been taken for granted, that they were well entitled to do so. *Doe, dem. Forster*, v. *Wandlass* (*a*), and *Roe, dem. West*, v. *Davis* (*b*), are cases to this effect, and so is 1 *Wms. Saund.* 286. N. 16.

It has been said, that, if the lease of 1808 be invalidated, the decision will shake many titles. I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence, I shall regret it; but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case, otherwise than as the words and legal effects of the instruments now under consideration seem to me to require. Upon the whole, therefore, I am bound for the reasons before given, to answer your lordships' question in the affirmative.

(*a*) 7 *T.R.* 117. (*b*) 7 *East*, 363.

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BEST J. My Lords, I am extremely sorry, that I cannot agree with my learned brother who has just addressed your Lordships, and to know, that the opinion which I am about to offer differs with those of many of my brethren, for whose judgments I have the highest respect.

The words of the power are, "and so as there be contained in every such lease, a power of re-entry for non-payment of the rent thereby to be reserved." The terms in which it is expressed are general and indefinite. Instruments in such terms are not to be abstractedly and absolutely considered; but with reference to the nature of the subject to which they relate. They are in law taken to contain such qualifications as are manifestly just and reasonable, and such as, according to practice, have before been introduced in similar cases, and which, not being expressly excluded, must be understood to be within the intent of the parties. This rule of construction is universal: it cannot be departed from without destroying the excellence of the law, which consists in its bearing a just relation to the state of things on which it is to operate. Thus, under contracts to sell goods, in which nothing is said as to the time of delivery, the vendor is not bound to deliver them the instant that the contract is made. Under a contract to perform a particular service, the contractor is not bound to begin his work immediately. In both these cases, the law allows a reasonable time for the performance of the contract. Under a contract for service for a year, the law will not compel the servant to serve every hour of the year; but excepts such a portion of time as is necessary for refreshment and relaxation. So, if there be an established usage, regulating the manner in which a thing contracted to be done, is to be done; as the time and circumstances of delivering articles sold, or the payment of the price, or the time for paying

a bill

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a bill of exchange. Such usage is by law incorporated into the contract without any words of reference to it.

Our books do not furnish many cases on this subject. There are enough, however, to satisfy us that, according to the practice that has long prevailed among conveyancers, the proviso for re-entry in this lease is a sufficient execution of the power. The existence of this practice and its being considered reasonable, account for there being no more decisions of courts on the subject. From the few cases that are to be found, the balance of authority seems to me, to incline much in favour of the validity of this lease. But the authority of the cases in favour of the lease is much strengthened by the practice of that branch of the profession of the law, who have been accustomed to prepare powers and leases under powers.

The first case is that of *Jones*, dem. *Bromefield* v. *Verney*. (*a*) Sir *John Cowper* had been enabled by act of parliament, to grant building leases for any term not exceeding 61 years, "so as in every such lease there be contained a condition of re-entry for non-payment of rent." The clauses of re-entry in the leases granted by Sir *John*, were for non-payment of the rent *in* 42 *days after the days of payment*. An ejectment was brought in the Common Pleas, to turn a tenant out of possession, who held under one of these leases; but no objection was made (although it is stated in the judgment that the case was fully argued) on the ground of the qualification introduced into the lease, by the words "42 days after the day of payment." This is but negative authority, but considering the great learning and industry employed in the discussion of this case, an objection must have been raised if the law had not been considered to be settled, and, if it had not been thought

(*a*) *Willes*, 169.

that

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that the lease was sanctioned by a practice, which no argument could overturn.

The next case is *Hotley* v. *Scot.* (a) The words of the power were, that if the rent should be behind or unpaid

(a) See *ante*, vol. i. 150. This case was quoted by *Moysey* in argument, before the Judges in the Exchequer Chamber, from a copy of a manuscript note of Mr. *Butler*, who has kindly permitted the reporters to give this case to the public. — The following report is copied *verbatim* from that learned gentleman's manuscript:

MICHAELMAS Term, 14th GEORGE III. B. R.

(This case is reported in *Lofft.* 316., under the name of *Hotley* v. *Scot.*)

Lord Tankerville *v.* Wingfield and Pritchard.

Upon ejectment, the case was as follows. Upon the marriage of Sir *John Astley*, his lady's estate was settled upon Sir *John* for life, with several remainders over, which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir *John*, such leases to be made for any number of years at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry, if the rent should be behind for 21 days; the rent to be made payable, and the re-entry to be incident to and go along with the reversion or remainder. In the same settlement, there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir *John Astley* and his lady revoked all the uses of the settlement that were subsequent to Sir *John*'s life-estate, and the powers incident thereto, and declared new uses. There was also a fine levied to the same effect.

21 *September* 1766, Sir *John* made two several leases of this date to the two Defendants, *Wingfield* and *Pritchard*, for 21 years, conformable to the power he had by the said settlement, and the other deeds and the fine, except that previous to the entry distress was to be made, and it was nearly in the following words: "That if the rent should be behind or unpaid by the space of 21 days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises, (except as therein is excepted) then it should be lawful to Sir *John Astley*, his heirs and assigns, to enter."

Sir *John Astley* and his lady being both deceased, the estates are descended upon Lord *Tankerville*, the Plaintiff, &c.

Dunning, for the Plaintiff. The Court always takes a difference between

unpaid for 21 days, the lessor should have power to re-enter. The condition in the lease was, if the rent

between powers, when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are always construed favourably to the persons making use of this power; the second are taken in a strict light: here it was certainly the second. It was a power to be exercised on the wife's estates, and, in some respect, in prejudice of his wife; and, therefore, to be taken strictly.

1st objection, that the settlement declares, that the power of re-entry should be reserved and made incident to the inheritance of the estate; and, by the lease it is reserved to Sir *John Astley*, his heirs and assigns. 2d objection, the settlement directs the re-entry so as to be reserved as above, to be made immediately, if the rent should be behind by 21 days. By the lease it is to be preceded by demand and distress.

These are strong, plain, and conclusive objections.

Bearcroft, for the Defendants. The remainder man, Lord *Tankerville*, has, substantially, all the powers he ought to have, or can have. As to the 1st objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident. The heirs and assigns of Sir *John Astley* mean those, who are heirs and assigns to the estate under the settlement, by which Sir *John* claims the estate. See *Cother* v. *Merrick*. (*a*) Tenant in tail died seised, his son entered and made a lease for 21 years, rendering rent during the term to the lessor, his heirs and assigns, and died. It was unanimously adjudged to be a good lease, and within the 32 *H.* 8.; the opinion of the Court being, that the word heirs, being a comprehensive word, it ought to be construed *secundùm subjectam materiem*, and to have that which the nature of the deed requires. This is much the stronger in the present case, as Sir *John Astley*, having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may, in some respect, be said to be the heirs and assigns of Sir *John Astley*. As to the 2d objection, that the re-entry, which is directed by the power in the settlement to be reserved immediately on the rent being behind 21 days after it is due, is by the lease to be preceded by distress and by demand. The words in the settlement are short and loose, and seem to be no more than a general direction that, in every lease to be made under this power, there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry; it is a direction that the power of re-entry, usually inserted in leases, should be inserted in the leases to be made under this power, in the usual manner. This, I apprehend,

(*a*) Hard. 89.

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should be behind and unpaid for 21 days, *and no sufficient distress*, then it should be lawful for the lessor to re-enter.

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hend, a sufficient answer to the objections raised against these leases; each is a verbal objection, and I have given each a verbal answer.

Mr. *Dunning*, in reply. The distinction I set out with, and the consequence of that distinction, that these leases are to be considered in a strict light, is not denied. And, besides this claim to the favour of the Court, Lord *Tankerville* has that of being the heir at law of the owner of the estate, on which this power has been exercised. Lord *Tankerville* is neither the heir, nor the assignee of Sir *John Astley*, he claims by a title paramount to Sir *John*'s. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several limittees of the settlement, when respectively in possession. The reservation is to the heirs and assigns of Sir *John Astley*. They are not limittees. This is, therefore, not a proper execution of the power. The case quoted, and the act of parliament (*a*) only show that, if a tenant in tail make a lease according to the statute, and reserves rent to himself and his heirs, the words "heirs and assigns" may be construed to be such heirs as may succeed by force of the entail. This construction can never, in the present case, take in Lord *Tankerville*, who cannot, in any sense or meaning whatever, be deemed the heir of Sir *John Astley* or his assigns. It is sufficient to say that, in pleading, he could never be described as such. As to the words being loose, and directing what should be done, and not describing *how* it is to be done, this seems a frivolous distinction. The settlement directs a clause of re-entry to be inserted in the lease; the lease says it shall not be lawful for Sir *John Astley* to enter as long as there is a sufficient distress or distresses to be taken. Till then, it is postponed. This is contrary to the words of the settlement, and is not, certainly, a proper execution of the power.

MANSFIELD. The two objections to these leases are, 1st, That, by the settlement, the reentry is to be made incident to the rent; but by the lease it is reserved to Sir *John Astley*, his heirs and assigns. And, in the event, it has not followed the rent, but gone to the heirs of the lessor, Sir *John Astley*, while Lord *Tankerville* is in the lawful possession and receipt of the rents. The 2d objection is, that the clause of re-entry, which, by the settlement, ought to be immediate, is by the lease fettered; being on a previous demand and previous distress. As to the first, by the nature of the power, it

(*a*) 32 *H.* 8.

must

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re-enter. Lord *Mansfield* in giving judgment, said, "The clause of re-entry is short with words of course, and does not preclude the operation of law — a re-entry is to enforce the payment of rent — by statute it cannot be without distress." The report of this decision is very short. It is probable that it does not give us the very words of Lord *Mansfield*, but we learn with certainty from it, that the court decided the very point now before your lordships in favour of the lease: for the power does not contain a syllable about a sufficient distress; this qualification is introduced into the proviso for re-entry, and yet the Court upheld the lease. It is clear, also, that Lord *Mansfield* must have referred to some form of drawing up these powers and clauses of re-entry which were then in use, and have expressed himself, that the power and clause in that case were

must go with the reversion and inheritance. The person who is in the reversion and inheritance, is he that is to enter on the forfeiture of the lease, and no one can enter but he, to whom the rent is payable; for, as *Littleton* says, no stranger can enter for forfeiture, for a stranger cannot be in by his former estate. If the rent had been reserved for the term, as in the case cited from *Hardres*, still it goes with the inheritance. Heirs and assigns can only mean those who have the reversion and inheritance; otherwise, as is said, 2 *Saund.* (*a*), they would be words of surplusage. The clause of re-entry must go with the inheritance the same as the rent, for it cannot be reserved to any body but to him who is seised of the inheritance. It was said, that ought to have been worded to the person next in reversion or remainder. The words heirs and assigns are general words, and are as good and quite tantamount to particular words. As to the second, the clause of re-entry is short, with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent, it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore, in both points, we agree to support the leases. So the verdict must be entered for the Defendants.

(*a*) 370.

agreeable

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agreeable to usual form. He is made to say, "The clause of re-entry is short with words of course." It is most probable that he said, the *power* was short with words of course; the obvious meaning of which is, that the power was expressed in the terms commonly used in such cases, and imported that sort of clause of re-entry, which it was then the practice to introduce into leases made under powers; that, the only object of the power being to secure the payment of the rent reserved, such qualifications as the law considered reasonable and consistent with this object, were not excluded: — as the legislature had thought the landlord ought not to have any greater facility for recovering possession of the estate, than he had at the common law when there was a sufficient distress on the demised premises, the introduction of such a condition into the clause of re-entry was but a reasonable qualification. This decision is an authority to shew, that reasonable qualifications may be introduced into clauses of re-entry, when the terms of the power are general; and, also, that the qualification most objected to in this lease is reasonable.

That a power expressed in general terms, is well executed by a lease containing a proviso with legal qualifications, is further proved by *Dormer*'s case. (*a*) "By special consent of the parties, a re-entry may be for default of payment of rent without demand of it. And divers other cases were put where the consent of the parties shall alter the form and course of the law." Although a clause of re-entry was absolute for non-payment of rent, yet the common law superadded the qualification to that clause, that the rent be demanded on the estate demised on the last hour of the day when it was payable; and, accord-

(*a*) 5 *Co.* 40. *b.*

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ing to *Dormer*'s case, the demand of the rent can only be dispensed with by special consent, or, (as it is expressed in *Newdigate*'s case (*a*),) "that it shall be lawful without *further demand* to re-enter."

If, at common law, a landlord could not recover possession against a tenant holding under a lease, containing a general clause of re-entry for non-payment of the rent without a demand of the rent, surely, when the legislature has relieved the landlord from making a demand of the rent, and substituted, in the place of that demand, the condition, that there be not a sufficient distress on the premises, the law will not allow the tenant to lose his estate, if there be a sufficient distress on it to satisfy the rent due. It will require the same express consent to exclude the condition of there being no sufficient distress since the statute of *George* the 2d., as was required to exclude the necessity of a demand of rent at common law.

I do not mean to say that, since the statute of *George* the 2d., a man may not proceed at common law. My argument is, the law annexed the condition of demand of rent before the statute, and, as the statute has now dispensed with a demand of the rent, when there is not a sufficient distress, the law will annex the condition of there not being a sufficient distress to a power expressed in general terms; and, therefore, a clause of re-entry containing this condition, is not inconsistent with such a power: otherwise, the tenant would not have the protection which, according to the spirit of the law, he ought to have; for, by an omission to pay the nominal rent on the day it became due, he might, without notice and with abundance of property on the land to satisfy the rent, be dispossessed of an estate, for which he had paid a large rent in advance under the name of

(*a*) *Dyer*, 68.

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a fine. This would be making that remedy, which was intended only as a security for the rent, a forfeit trap.

The decision in the Court of King's Bench, in Coxe v. *Day*, is supposed to establish a contrary doctrine. Lord *Ellenborough*, during the argument of that case, seems to have intimated an opinion inconsistent with that which I have offered to your Lordships. But, my Lords, it is not dealing fairly with that great Judge to hold him to what he threw out whilst he was forming his opinion, particularly when it is contrary to what he afterwards decided, when the case now before your Lordships was in the King's Bench. The wisest of men could not escape the charge of inconsistency, if expressions, which are dropped while the mind is struggling with the different considerations presented by conflicting arguments, are to be recorded. I know not on what ground the Court agreed to the certificate which was sent to the Court of Chancery: but, I cannot admit that this certificate is an express authority on the point now under consideration, when the case presents a ground, on which, with the opinion that I entertain on this case, I should have signed that certificate. The power in *Coxe* v. *Day* was in these words, " So as in every such lease there be contained a condition of re-entry for the non-payment of the rent reserved by the space of twenty-one days." The words of the proviso were, " if the rent should be in arrear for twenty days — *being lawfully demanded.*" The words " being lawfully demanded" weakened the landlord's security for his rent, by imposing on him the necessity of demanding it on the last hour of the day on which it became due, a thing always found to be attended with difficulty, and often impracticable, and from which landlords are relieved by the statute of *George* the Second. Such a proviso could not be sufficient under such a power.

If

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If authority, my Lords, be doubtful, we must recur to principle. When property in lands is divided into estates for life and estates in remainder, it becomes our object to secure to the possessor all the advantages which belong to his estate. The mode of doing this is by giving to the tenant for life a power to grant leases for certain terms not determinable with his life. Unless he has this power, the estate will not be cultivated as it ought to be; much less will it be improved: and not only tenants for life, but the public would suffer from the want of such powers. In the granting these powers, care must be taken that, in granting their leases, tenants for life do not prejudice the estate of the remainder-man: possession of the lands must be secured to the tenant, and the rent to the landlord. Considering this as being the object of these powers, Judges, in the construction of them, will only have to consider — what did the maker of the power consider sufficient to attain this object? Can any one doubt, that the maker of this power would have considered the clause of re-entry in this lease abundantly sufficient to secure the rent? But for the respect which I feel for those learned Judges, with whom I differ on this subject, I should have said, without doubt or hesitation, "*a* clause of re-entry" means in law what these words would in common conversation, viz. such a clause of re-entry as is generally inserted in leases. That this clause answers that description will not, I think, be disputed.

That the principle, on which I found my opinion, is a sound legal principle, is evident from the following cases. In *Hotley* v. *Scot*, Lord *Mansfield* says, "a re-entry is to enforce the payment of rent." In *Wadman* v. *Calcraft* (*a*), Sir *William Grant* says, "There is no doubt equity will relieve against the forfeiture; consider-

(*a*) 10 *Ves. jun.* 69.

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ing the purpose of the clause of re-entry to be only to secure the payment of Rent; and that, when the Rent is paid the end is obtained." In *Opey* v. *Thomasius and Others* (*a*), *Twisden* J. says, "powers are to be expressed according to the intent of the parties." In *Goodtitle* v. *Funucan* (*b*), Lord *Mansfield* says, "powers are now a common modification of property in land, and, as such, are to be carried into effect according to the intention of those who create them."

My Lords, I shall not advert to some facts which are found by this special verdict, and on which arguments might be offered in favour of this particular case. My opinion is formed on these general grounds: Where the power is expressed in general terms, as it is in this case, reasonable qualifications are not excluded, but may be introduced into the clause of re-entry; and the qualifications introduced into this clause have been acknowledged by the legislature and the course of law to be reasonable. "*A* clause of re-entry" means the usual clause of re-entry, and the clause of re-entry in this lease is such as is usually inserted in such leases. I believe, that it has been so much the general practice of conveyancers to insert such clauses, that, if your Lordships were to declare this lease invalid, you would destroy the titles of a very large proportion of the landholders in the kingdom. Much of the property in the *west* is held by leases granted by tenants for life: I know that, in other parts of *England*, actions are already brought to turn tenants out of possession of those estates on the same objections as are made to this lease. Some of these actions have been brought to trial before me, and now await your Lordships' judgment in this case.

(*a*) Sir *T. Raym.* 134. (*b*) *Doug.* 573.

My

My Lords, I have heard the learned Judges say, that they would never allow a practice to be set aside, on which the titles to many estates depended, however much they might disapprove of such a practice. If your Lordships set aside this lease you will turn a large proportion of the tenantry of *England* out of estates, for which they or their ancestors have paid large sums of money, and which have been continued in their families by a successive renewal of leases, for as great a length of time as any of your Lordships' families have held their estates. The personal property of tenants for life, the fund out of which provision is to be made for the younger branches of families, will be drained to make compensation to the leaseholder for the loss that he has sustained by being deprived of his lease; and, where these funds fail, the families of the leaseholders will be ruined.

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I have only further to say, that I see no reason to hold the lease stated in the special verdict invalid.

Garrow B.

GARROW B. The settlement made upon the marriage of Lord *Vernon* with Lady *Louisa Barbara* his wife, of the 2d *July* 1757, on which this question arises, gives a power of leasing requiring, with respect to property of the nature in question, that there shall be contained in the lease a power of re-entry for non-payment of rent. In this leasing power, no time is specified by way of indulgence to the tenant, as to the payment after the day on which it shall fall due; nor are any other terms required than, that the person, who from time to time shall be in possession of the estate, shall insert in the lease a power to resume the possession for non-payment of the rent.

The lease, granted by Lord *Vernon*, to the Defendant and another, contains a clause for re-entry, if the rent

 shall

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shall be in arreaar for the term of fifteen days, and if there shall be no sufficient distress upon the premises to satisfy the rent, and the question is, whether this is a good execution of the power, or, in other words, whether this is such a power of re-entry as was required by the creator of the settlement?

It is observable, that the creator of the power, or those who advised her, knew how to make distinctions as to powers of re-entry applicable to different estates; and, in the case where the rent reserved is of the most valuable description, there the creator of the power only requires of those who shall come in succession into the possession of the estate as tenants for life, that they shall, for the preservation of the estate, in the most beneficial form and extent, for those who shall be from time to time interested as reversioners, insert a provision, that, if the valuable rent reserved on leases for years absolute, shall not be paid for 28 days, then there shall be a right to enter at the expiration of these 28 days.

In the case of the render of 2*l.* a year, and a couple of fat capons, or 18*d.* at the option of the lessor, it is insisted, that the power of re-entry should be altogether absolute and unconditional; and that, at the first moment when the day has expired on which the money is demandable, the power of re-entry is to attach and enable the reversioner at that moment to turn the person out, who; upon a valuable lease for years determinable upon lives, should have permitted the day to expire before he had paid his sum of two pounds. I admit, that, if the maker of the settlement had in express terms said, "the power shall be to re-enter the moment at which the rent is due, and not paid or tendered," a court of law could not alter, but must execute such power so expressed. We must see whether the power has been complied with or not.

Now

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Now the terms of the condition in the settlement are, that there shall be contained in the leases a power of re-entry on non-payment of the rent. Is there not in the lease granted to the Defendant, a power of re-entry on non-payment of the rent? There is; but, it has been urged with great force, that it is not such a compliance with the power as the reversioner had a right to expect the lessor should have made; for he has clogged the clause of re-entry with a delay of fifteen days, and with the necessity of seeing that there is no sufficient distress upon the premises. The answer to this appears to me to be, that, according to our experience, such an event is so improbable, that it probably did not occur to the maker of the power to guard against it; and not having in express terms required any particular form or terms of the clause for re-entry, I think the power is satisfied by that which has been inserted in the lease in question, and, consequently, that the lease is not invalid.

Burrough J.

BURROUGH J. Since the judgment was given in the Court of Exchequer chamber, I have paid the closest attention to the subject. I have, over and over again, weighed in my mind the various facts and circumstances contained in the special verdict, and I have earnestly endeavoured to discover whether I had formed an erroneous opinion when I concurred in that judgment.

After the fullest deliberation, I am of opinion that the demise of the 5th *September*, 1803, is invalid; that it was valid only during the life of the lessor, and that his death determined the estate of the lessee.

The statute of the 1 *Geo.* 2. *c.* 28. was relied on in the Exchequer Chamber, and in argument before your Lordships, as bearing on the subject. In my view of this case, it has no application to the subject before the House. That statute, as I conceive, applies only to

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leases which, before the statute, might and must have been avoided by entry; to cases where the cause of avoidance might have been waived. Such leases were valid till a strict legal entry was made, and before such entry they were capable of confirmation by suitable acts done by him in whom the right of re-entry was. But a lease by a tenant for life having a special power to demise, if not made conformable to the power, is the lease of a mere tenant for life, and has validity only during his life, and not a moment longer.

I cannot see that any well-grounded argument from a provision made by an act of parliament, in the case of demises of a description wholly different from the demise in question, can be urged in support of that demise. In forming our judgments on the questions submitted to us by your Lordships, we must consider that we are required to give our opinion on the construction of a deed. There are certain rules of the common law which must govern us on such an occasion. One rule is, that the construction must be made on the whole deed. The principle of the common law is, that *Ex antecedentibus et consequentibus est optima interpretatio.* (a) There is another rule which also strongly applies to the case in question, and that is, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.* Acting on these rules, I contend that there is no ambiguity in the words of the power, and that it is manifest, from the various parts of the deed of the 2d *July*, 1757, that it was the intention of the parties to have these words understood as they are written, and without addition.

The clause of re-entry in the demise ought, I contend, to have corresponded with the *reddendum*, which is

(a) *Shep. Touch c. 5. rule 4. fo. 87.*

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is to this effect, "yielding and paying the yearly rent of 2*l.* at *Michaelmas* and *Lady-day*, by equal portions;" and, not so corresponding, I am of opinion the lease is invalid. First, because there can be no re-entry unless this rent is behind and unpaid for 15 days from *Michaelmas* and *Lady-day*, which is an extension of the time beyond that in the *reddendum*. Secondly, because the re-entry for the non-payment of the rent cannot, by the express terms of the demise, be made, if there is sufficient distress to be had on the premises. The general scope of the deed is too well known to require repetition. It has, heretofore, been considered, that there are three distinct powers in this deed. I conceive that, correctly speaking, there is only one power consisting of three distinct parts. I say this, because the enabling words "that it shall and may be lawful, &c." are placed at the head of the whole, and are not afterwards repeated; and the other parts are introduced by the words "and also." It appears to me, from this mode of looking at the deed, that it may be fairly collected, that the framers of it must have had their minds directed to the different *parts* of the power; and must have designedly and deliberately introduced an additional restriction on that part of the power, which relates to leases for years and references in other parts to extrinsic matters, and designedly and deliberately omitted any such additional restriction in the part of the power in question, and also all words of reference to extrinsic matter or former leases.

The first part of the power is that which relates immediately to the demise in question; by this Mr. *Vernon* and his wife (who by the deed took successive estates for life) are enabled to grant leases for life or years, determinable on the death of a life or lives, of such lands as, at the time of the deed, were leased for life or years determinable on the dropping of a life or lives; so as the

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ancient and accustomed yearly rents, dues, and services, or more or as great and beneficial rents, &c. be reserved or made payable, and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. Now, what is the rent thereby to be reserved, but the *reddendum?* — the power of re-entry is to be for the non-payment of that rent. If that rent was not paid at *Michaelmas-day* or *Lady-day*, I contend, that it is plain, by the very terms of the deed, that the right of re-entry ought to be complete.

It is not to be doubted that former leases were admissible in evidence for two purposes: first, to show what lands were, at the time of the demise, leased for life or years, as described in the deed; secondly, to show what the ancient and accustomed rents were; for, former leases are, for these purposes, necessarily referred to. But, it appears to me to be free from doubt that, as to the power of re-entry prescribed by the deed, there is no reference to former leases or to prior circumstances, but to the *reddendum* only, ascertaining not only the rent itself, but, also, the mode and time of payment. This power of re-entry prescribed by the deed is framed in plain terms; it contains a clear proposition in itself, and, therefore, I contend, that the maxim that *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* is precisely applicable to the point. Thus to decide, is to avoid the vicious mode of interpretation, which is reprobated, by a maxim to be found in Lord *Bacon*'s tracts. (*a*) *Divinatio, non interpretatio est quæ omninò recedit a literâ.* If you stir beyond what the deed expressly prescribes, then commences the *divinatio*, and the *intepretatio* is at an end.

Next follows in the deed what, I say, is more properly a second part of the same power, than a distinct and

(*a*) 67.

separate

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separate power. The general enabling words being at the beginning of the whole, this part is connected with the former part by the words "and also." "And also, by indenture, to demise any of the lands in the settlement, for any term not exceeding 21 years in possession, so as there be reserved as much or as great and beneficial yearly and other rents as were then yielded, or the best and most improved yearly rent or rents as can be reasonably had or obtained, and so as in every such lease for an absolute term of years, — (thus distinguishing them from the former leases) — there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid for the space of 28 days after the time thereby respectively appointed for payment thereof." This part of the power, which is, as it were, uttered in the same breath with the former part, under the same enabling words, and united to them by the words "and also," affords very important observations. First, the rents to be reserved in these leases, are to be as much or as great and beneficial as were then yielded; here, then, is a plain reference to the then existing state of rents. To prove this, the former leases were good evidence. Or, secondly, the rents are to be the best and most improved that can be reasonably gotten: this admits, too, of reference to extrinsic matters. The 3d observation is as to the clause of re-entry prescribed by this part of the power, in case the rent be behind or unpaid for 28 days. With great deference to the judgment of those who entertain a different opinion, I cannot refrain from expressing my strong opinion on this part of the deed. In my mind, it affords an argument of irresistible weight, that the parties to this deed intentionally omitted an extension of the time of payment in the first part of the power, under which the demise in question is contended to be valid; and that they intentionally inserted the extension of 28 days in the second

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second part: and I confess, I feel myself alarmed at the fate of men's deeds, if it shall be holden by your Lordships that the demise in question is valid, which contains an extension of the time of payment to 15 additional days, not hinted at in the power itself, and inconsistent with the *reddendum*; and which, also, contains a provision which deprives the reversioner of his re-entry, if, on any part of the premises, there may chance to be sufficient distress. That the clause of distress imposes a difficulty on the reversioner is proved by the case of *Rees on dem. Powell* v. *King* and *Morris*, tried before Mr. Justice *Heath*, in the summer of 1800, at *Hereford*, whose opinion was ratified by the opinion of the Judges of the Court of Exchequer in the following term. It was there held, that a clause of forfeiture in a lease, in case no sufficient distress was to be found on the premises, must be pursued strictly, and every part of the premises must be searched.

The third part of the power is introduced in the same manner as the second part: this is the part which empowers the leasing mines then open, or lands wherein persons may be willing to open mines. Annexed to this there are several restrictions running in this language: "So as in every such lease there be reserved or made payable such parts of the lead, copper, ore, coal, and other produce to be gotten from the said mines, or such other yearly rent or income in respect thereof, as can be reasonably had or gotten for the same, without taking any fine, &c., and so as the lessees execute counterparts; and so as there be inserted such proper and usual covenants for the effectually working the mines, &c., and doing all proper and necessary acts as are usually inserted in leases of the like nature." It is to be observed, that, with respect to these leases, there are special restrictions peculiarly applicable to them. The parties to the deed had all the parts of this power before them,

and

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and have cautiously introduced restrictions applicable to each part: and, can a court of law add to these restrictions? The rents of the mines, or the parts of the produce to be reserved, are to be such as can be reasonably gotten; the covenants are to be the usual covenants for effectually working them and doing all necessary acts.

In the second and third parts, the word "reasonably" is introduced; but it is wholly omitted in the first part. Is a court of law authorized to transplant the word "reasonable" to the first part, when the parties have introduced it in the second and third parts, and omitted it in the first part? I humbly submit to your Lordships, that this cannot be done, if it varies the construction of the words as the parties have penned them. We are required to state to your Lordships, our respective opinions, whether, having regard to the due intent and meaning of the indenture of *July* 1757, according to the legal construction of the several parts of it, and having due regard to the legal effect of the facts and circumstances found by the verdict, the demise is for any and what reasons invalid? I feel, that if I depart from the plain meaning of plain words, made (if it were possible) more plain by the context matter, that I shall be at sea without a compass. If the demise in question had contained a power of re-entry framed in words literally corresponding with the words in the settlement, I conceive it would have been good. I have heard no valid objection to such a power of re-entry, notwithstanding the most earnest attention to the subject before and since the arguments in the Exchequer chamber, and before your Lordships: I have not been able to raise in my mind a doubt of the fitness of such a clause, or of its being that which the parties intended.

For the reasons I have stated, I am of opinion, first, that the former leases were not admissible in evidence

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dence to shew that they contain clauses similar to those to be found in the demise in question, respecting the extension of the time of payment, and respecting the distress. Secondly, I am of opinion, for the reasons I have given, that the demise in question is invalid. The House has been told at the bar, that a decision, that this demise is invalid, will have the effect of destroying other leases made under similar powers. I cannot take notice of such a statement, first, because it is an assertion of a fact, of which, as a judge, in a court of law, I can have no knowledge; secondly, if it were fit that it should weigh with us, ought we not to see the settlements and the leases, in order to know that the *antecedentia et consequentia* are the same as in the case before your Lordships? A variation in the words and context matter might vary the grounds of our judgments. Thirdly, if there were other leases made under circumstances precisely similar, it would not vary the opinion I have formed. I cannot accommodate my opinion to the convenience of lessees under powers; their estates must stand or fall by the authority under which they are made. It is a maxim of our law, that it is better to suffer a mischief than an inconvenience: the mischief (if it be any) we can see the extent of; it will be that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of there being no good subsisting leases, will take. On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of law in the construction of these deeds.

I have only a few words as to the cases of *Hotley* v. *Scot* (*a*), and *Coxe* v. *Day*. From the report of the first case, I cannot discover what was decided, it is to

(*a*) *Lofft*. 316.

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me unintelligible; but, supposing it to be applicable, we have the later case of *Coxe* v. *Day*. The decision of the four learned men on the second question has great weight with me, and I cannot see why it ought not to guide our judgment on the present occasion. It is well known, that the late learned Lord Chief Justice of the Common Pleas, Sir *Vicary Gibbs*, thought that decision right, and was of opinion, that the present lease was invalid: he was in office when the present case found its way into the Exchequer Chamber.

Holroyd J.

HOLROYD J. I think that, having due regard to the true intent and meaning of the indenture of the 2d day of *July*, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th of *September*, 1803, as the same is stated in the special verdict, is invalid.

By the death of Lord *Vernon*, the lessor, who had an estate in him for life only, that demise became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2d of *July*, 1757. That indenture contains three powers of leasing; one, for a life or lives, or for a term determinable on a life or lives; another, for years not exceeding twenty-one; and the third, for working mines or ore for years not exceeding thirty-one. Each of these powers is clogged with qualifications of two descriptions; one class of which is comparative, or with reference either to the existing or previous state of things, or to usage or custom, or to what can reasonably be had or obtained; the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage or custom,

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custom, or to what can be reasonably had or obtained, or to any matter whatever; these last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think, without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon any usage, custom, or state of things, or any matter whatever.

The first of the above powers of leasing is that upon which the present question depends, the power of leasing for a life or lives, or for years determinable upon a life or lives. The qualifications, with which that power is clogged, are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more or as great or beneficial as at the time of the demising were payable, or as much as a just proportion thereof amounts to, according to the value of the premises demised or more, with the exception of heriots. These qualifications are comparative, or with reference, expressly, to the things there expressed; and must be such as, on such comparison or reference, shall be found conformable thereto, and are wholly dependent thereupon. But the other class of qualifications superadded to this power is direct and absolute, and without reference to and wholly independent, as it seems to me, upon any other matter except what the law requires, and to be complied with at all events, whatever may be or may have been any usage, custom, or state of things whatever. — These other qualifications are, that the rents, duties, and services be incident to and go along with the reversion and remainder; that the leases contain a power of re-entry for non-payment of the rent reserved, and not contain any express clause freeing the lessees from impeachment of waste, and that the lessees' seal and deliver a counterpart of the lease. It is upon one of these direct, absolute,

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lute, and independent qualifications of that power, that the present question has arisen. That qualification is in the following words: "So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." This qualification being expressed in words that are direct and absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is, in the words, no latent ambiguity, which those former leases either raise or remove. If the words be not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself, and they cannot, I think, by law be allowed to crave in aid any former usage to vary or alter their construction: and this more especially in the case of such a deed as the present, wherein the parties expressly direct, that a reference to the then existing or former usages should be had recourse to, where they intend that either of them should be called in aid on the subject-matter of these qualifications. Besides, it has been held by the Court of King's Bench, in *Iggulden* v. *May* (a), as well as by the Lord Chancellor in the same case (b), ratifying similar doctrine that had before been held both by Lord *Alvanley* and Sir *William Grant*, when Masters of the Rolls, on covenants for renewal of leases, that the construction of deeds cannot be varied by the acts of the parties; and, therefore, various other leases, that had before been successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The instability and uncertainty introduced into rights

(a) 7 *East*, 237. (b) 9 *Ves. jun.* 329.

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of property created by deed, by letting in such extrinsic evidence, and the mischief arising therefrom, would apply equally, as it seems to me, to the present case.

The present question arises in a case where the exercise of the power is by a person (namely, Lord *Vernon*) who, previous to the creation of the power, was a stranger to the estate; and in a case, where this qualification of the power given to him by his wife, must be taken to have been inserted as well for the benefit of herself, as of the several other persons in remainder, in derogation of whose rights his exercise of the power would operate, so long as the lease should continue valid after the extinction of his life estate. It would operate in derogation of her and their rights, by depriving them, successively, of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them, successively, in lieu thereof, a rent or rents such as the power required, however inadequate the same might be.

The power given to the tenant for life to lease for a term that may last beyond his own life, is, agreeable to what is said by Lord *Ellenborough* in *Coxe* v. *Day* (*a*), for the benefit of the tenant for life; the qualifications only, as he there, also, says, are for the benefit of those in remainder: and, in this case, those in remainder, who are to be protected by these qualifications (except the creatrix of the power herself), are not parties or privies, but are strangers to the deed; and, therefore, as to them, the words of the deed are to have their full operation for their protection against the tenant for life, who executed the power, and against whose act, which would or might be to their detriment, they were to be protected by this qualification. The very intent of prescribing these requisites is to protect the several

(*a*) 13 *East*, 127.

remainder-

remainder-men from the discretion of the tenant for life in the exercise of this power of leasing given to him. The object of the qualification is to secure to them the rent itself, and not to give them any substitute whatever in lieu thereof, other than and except the land itself, for which the rent was to be paid. For this purpose, this qualification looks to and specifies some occasion or event, and that, a simple unqualified one, namely, the non-payment of rent, not under any particular circumstances only, but generally, whenever there is a non-payment of rent: that is to say, it looks to and specifies the default of the lessees by the non-payment of the rent as the occasion or event, on which those entitled to the rent to be paid for the land, shall, for want of the rent, have the land itself, the *quid pro quo* the rent was to be paid. Whenever that event or default arises, the case then exists, I think, on which the land was to be had for that default, without any other matter being to be superadded thereupon, except what the general rules of law, independently of particular terms of contract, would require, such as those requiring in a particular manner and form, a demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease, are "a power of re-entry *for* non-payment of the rent thereby to be reserved;" that is, as I think, such a power as will authorize the party, whenever there is a non-payment of the reserved rent, to re-enter. That is the express cause, on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause; and that cause which is non-payment of rent, (such, I mean, as will authorize a re-entry) exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry: and that default of payment equally exists from the moment of such a demand as the law requires being made of the rent

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due and non-payment thereon, without any subsequent definite period of time having elapsed; and whether there be or be not distrainable goods on the premises sufficient to pay the arrears of the rent, and by the sale of which the remainder-man may, at *his own trouble and risk*, pay himself those arrears. The words "for non-payment," must in this case, I think, be taken to mean the same as either, "because of" — "by reason of" — "on account of," or "in case of non-payment;" that is to say, when that event occurs, and the same, therefore, as if the words were *on* non-payment of rent. That appears to me to be the proper sense and meaning of the words; and it is also, as I think, agreeable to the object of the qualification, which is, that the party shall have the land, whenever the lessee fails to pay the rent for it. The lessee's failure or default in the performance of a duty, which it is incumbent on him to perform, is the sole ground and consideration for entitling the party to re-enter and have again the land without regard to any possibility or power, which the rent-owner may have to obtain the rent by any other means or exertions of his own.

But it has been argued, that this qualification, in requiring a power of re-entry, is silent as to the time when it should be carried into effect; and, therefore, that it may be considered to require only, that there should be some reasonable power of re-entry for non-payment of the rent, and that the power of re-entry reserved upon the lease in question, is a reasonable power of re-entry for non-payment of the rent, and, therefore, as much as the creatrix of the power has required. To this, besides observing that the word "reasonable" is not here used in the deed, though it is used in two other instances in giving those powers where a discretion was intended to be given, I answer, that this qualification, in my opinion, is not to be so considered,

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sidered, if, upon the due and proper construction of this leasing power, this leasing power, if fully executed, would have authorized a re-entry for non-payment of rent in any case, in which such entry would not be authorized for non-payment of rent upon the lease in question. And I say, that there are cases, in which, if the power of leasing had been fully executed, a re-entry might lawfully be made for the non-payment of rent, in which it could not lawfully be made under this lease.

To try whether this be so or not, suppose the right of re-entry reserved by this lease, instead of its being in its present form, had used the very words of qualification used in the deed creating the power of leasing. Suppose the lease had been, "Provided that it shall be lawful for the lessors, &c. to re-enter" (or, "that they shall have power of re-entry,") "for non-payment of the rent hereby reserved." That is an easy and obvious way of framing the proviso, and most likely to be adopted, as I should think, by a person having recourse to, and looking at the leasing power, as he ought to do, who is anxious to be secure; and that clearly, I think, would have been a due execution of the power, and under such an execution of the power, by using those words in the lease, whenever there was a default of payment, whether fifteen days had elapsed or not since the rent became due, or whether a sufficient distress was on the demised premises or not, the right of re-entry would have arisen in case the landlord had made such a demand of the rent as the law for that purpose requires: so that the same construction would be given to those words, where used in the lease, as if the words had been *on* non-payment of rent; whereas, according to the right of re-entry actually reserved, the landlord has no such right of re-entry (though the rent is due, and has been so demanded,) for fifteen days, during which he would have such a right, under such a due execution of the power of leasing as I have above supposed, nor

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would he have such right of re-entry at any period of time when there was a sufficient distress on the premises, on which he might levy for his rent, though upon the goods of innocent third persons; which right of re-entry he would have during all that period in the other case, and without the painful necessity of being driven, in any case, to his remedy by distress upon the goods of innocent strangers. So that he has not that right and specific remedy in lieu of his rent in those cases, under the lease in question, which he would have had under it on such a due execution of the leasing power, as I have above supposed; but a different one, and such, as in some of such cases at least, some conscientious persons would not resort to or enforce, such as enforcing the power of distress upon the goods of innocent third persons. The construction of the words in question, therefore, if used in a lease instead of being used in the leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on non-payment of the rent. They cannot, therefore, I think, be properly deemed to have a different import and signification, when used in the leasing power, from what they would have in a lease made in conformity to that power, or that they would have, if they were used in any lease whatever. There is not only no right of re-entry given for non-payment of the rent, until a default of payment for fifteen days; but even on such default, the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in *Horseman*'s Conveyancing, in the edition that I have, I have been able to find only one that is clogged with the insufficiency of distress; all the others appear to be without it. Those leases appear to have been between the

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times of the statutes of *William & Mary*, and *Geo.* 2., and several of the conveyances there for securing annuities give, first, a power of distress, in case the annuity be in arrear for a given number of days, and a right of entry and enjoyment, till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not any sufficient distress upon the premises. I think, too, that it affords an argument in favor of the above construction, and that nothing else can legally be deemed to have been in the contemplation or intention of the creatrix of the leasing power, when she used the words in question, than a mere simple non-payment or default of payment of rent *generally*, unaccompanied with any other fact or circumstance, except that which the general rule of law requires, viz. a demand. It is manifest that, where she meant any other fact or circumstance should accompany that non-payment before the right of re-entry should be given, she has expressly mentioned it; for in the second leasing power, she enables leases to be granted, though the right of re-entry be not reserved except upon a lapse of non-payment for 28 days, after the time appointed for payment of the rent. And I do not see how the lease in question can be held to be valid, except upon principles of law that would have rendered it also valid, in case the creatrix of the leasing powers had, also, expressly added in the second leasing power, another ingredient besides that lapse of 28 days, namely, the want of a sufficient distress upon the premises, without both which, in addition to the mere non-payment of rent, a right of re-entry need not, in that case, have been reserved under the second leasing power.

But, in truth, the reserved right of re-entry which is now in question (whether it is to be deemed reasonable or unreasonable) is not a right of re-entry for non-

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payment of rent; but it is, in truth, a right of re-entry for a different thing, which may never exist, notwithstanding there is a default of payment of rent, namely, for an aggregate, consisting in part, indeed, of that default, but of two other things besides, namely, a certain lapse of time, and a want of sufficient distress. It is, in reality, not a right of re-entry for non-payment of rent, but a right of re-entry for want of a sufficient distress, in case of such non-payment. Instead of giving a right of re-entry for non-payment of rent, it refers the remainder-man to the right of distress on that event, a right which he would have by the general law, even without such reference; and it gives him the right of re-entry only at a later time, for a different thing, and on a further event, viz. the want of sufficient distress.

It is not, therefore, in reality a right of re-entry for the same thing as the creatrix of the leasing power required it should be for, (and which right, as I have said before, must, I think, be co-extensive with the existence of the thing, or event, or default, for which it was given); but it is a right of re-entry for a combination of things, all of which must exist, before the right of re-entry can be exercised. And how reasonable soever it may be thought, that this qualification of this leasing power might have been given by its creatrix for the securing of the rent, instead of the qualification she has actually given to it, it cannot, I think, be substituted for the qualification, which she has actually given and required.

But it has been argued, that all this is immaterial, because of the general clause of re-entry that follows, for default of the performance of any of the reservations, covenants, &c. But it is so completely settled, both on the maxims and authorities of law, that the *general* clause of re-entry can extend only to cases not before

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specially provided for, more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more upon this point.

But, then, it has further been objected, that, this leasing power being given and executed since the statute 4. *Geo.* 2. (*a*), the insertion of the want of a sufficient distress on the demised premises in the leases, in order to give the right of re-entry, has become immaterial; because it has been urged, that, since that statute, no right of re-entry for non-payment of rent can be rendered effectual, so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises countervailing the arrears of rent due. But that statute does not appear to make any difference in the present case. That statute applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and substitutes for his relief other things to be done in lieu, and then gives him the benefit of a forfeiture, (to which he would not be otherwise entitled,) and gives him that benefit only in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But, notwithstanding that statute, where a due demand of the rent has been made, a right of re-entry may be given, and may be effectually enforced, though a sufficient distress be upon the demised premises. That statute, too, applies only to cases where a half year's rent is in arrear, and not to cases where a less arrear of rent is due, as may be on the lease in question by a part payment, although the rent is reserved not quarterly but half yearly.

But it has been further urged, that not only the above statute of the 4th *Geo.* 2d., but also the cases both at

(*a*) *c.* 28. *s.* 2.

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law and in equity shew, that the object of a power of re-entry is only to secure the payment of the rent. It was then contended, that this payment of the rent is as effectually, and as beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been reserved in the words used in the leasing power; inasmuch as it is said, that it reserves the right of re-entry in all cases where the landlord cannot himself by a distress obtain the payment of the rent. This, it was argued, appears by the necessity there is (even after entry) of obtaining judgment and execution in an action of ejectment, before possession can be obtained; and by the relief, which the courts, both of law and equity, but more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for non-payment of rent. But let us see how the case as to this point stands. If the right of re-entry reserved had been merely for non-payment of the rent, in the terms of the right of re-entry required by the leasing power, it is clear, I take it, that, on a due demand of the rent being made, (and by the statute 4th *Geo.* 2d., even without such demand, where half a year's rent remains due,) the landlord would have been entitled either to have the rent itself actually paid to him, or to have the land. No other act in that case need be done, or any trouble or risk undergone by him with regard to the rent; but, without further act, trouble, or risk on his part, he might immediately enter into the land, or immediately proceed to recover the possession thereof by an action of ejectment, against which the tenant could not gain relief, without his paying the rent itself with costs: and, unless he thus gets such relief, the landlord would be entitled to recover all the mesne profits from the time of the default, by the non-payment of rent. The right of re-entry actually reserved in the present case, gives him no power to re-

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enter or to proceed by ejectment, until the expiration of 15 days, nor at any period of time, until there is the want of a sufficient distress upon the premises, nor any right to recover the mesne profits further back, than not only the expiration of the 15 days, but also the time when there can be proved to be, or when there was such want of distress: and, so long as there continues such a distress, the only remedy the landlord has for the rent is by action for it, or by distress; so that, instead of having the rent by the payment and act of the lessee himself, or, in default thereof, an immediate right to enter or recover possession of the land itself, the remainder-man is driven to the necessity of incurring not only the trouble and expense of ascertaining — whether there is or is not a sufficient legal distress upon the premises, — whether of the property of the tenant or of third persons, — of waiting, where the distress is of standing corn, until it is ripe and cut, (for till then it cannot by the statute be appraised or sold for payment of the rent,) — but, also, of incurring the trouble, delay, and risk attending the making the distress, in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise. Not only is the remainder-man driven to this trouble, but the tenant may also deprive him of the power of sale by a replevy of the distress; and, it may happen at the end of the replevin suit, that by the eloignment of the distrained property, the insufficiency of the pledges in replevin, and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs both of the distress and of the replevin suit; and, if this does not happen, he may still be without his rent, unless

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he take upon himself the trouble and expense of prosecuting execution *pro retorno habendo*, or for his debts and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin, in case such execution shall prove ineffectual; and his remedy by ejectment would be, in that case, delayed until these results of the replevin suit shall have been ascertained, even if an action of ejectment would then lie for the non-payment of that rent which had been before distrained for. So that, after the termination of the distress and replevin suit, it may happen, that the remainder-man may lose his rent with the addition of costs. The payment of the rent is not, therefore, I think, as effectually and beneficially secured by the right of re-entry actually reserved, as if that right had been reserved in the words of, or according to the leasing power.

I have considered the question, as above, independently of the disputed authorities of *Coxe* v. *Day* (*a*), and *Doe dem. Vaughan* v. *Meyler* (*b*), both which cases, I think, were rightly decided notwithstanding the prior case of *Hotley* v. *Scot*. I have considered the question, too, as if, in the lease, the rent reserved had been a money-rent only, because it has been so treated in the arguments here, and in the courts below. But it is to be observed that this is the case, not of a lease for a money-rent only, but, also, for a rent of another nature, although certainly a very small one, namely, the additional rent of a couple of fat capons or money at the election, not of the tenant, but of the lessor or remainder-man, who would, therefore, be entitled, if he pleased, to have that rent in kind, instead of money. It has been considered on all sides as the case of a lease for a money-rent only; I presume, on this ground, that the

(*a*) 13 *East*, 118. (*b*) 2 *M.* & *S.* 276.

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special right of re-entry, depending on the want of a sufficient distress, does not apply to this additional rent or reservation, but to the money-rent only, and that the right of re-entry applicable to this additional rent is the general right of re-entry subsequently given by the lease in case of default in payment or performance of any of the reservations, covenants, &c.: and this may be the case if the statute 2 *W. & M.* (*a*), which is the statute giving the power of sale of a distress for rent, be deemed to be confined to money-rents only. But, if the default of payment of this additional rent be within the special rights of re-entry depending on the want of a sufficient distress, more especially, if this kind of rent be also not within the above statute of *William & Mary*, so that the distress could not be sold under that statute for the purpose of raising or paying that rent, though, if it could be so sold for that purpose, it would not raise the rent in kind agreeable to the landlord's right of election but in money only, at least not without additional trouble and expense to the landlord of purchasing the rent in kind with the money raised by the sale, that is, either by doing it himself or procuring another to do it, I say that, in such case, the question proposed to us by your Lordships, as it appears to me, would embrace still further considerations arising from those circumstances, as the distress for that small rent in kind, viz. the two capons, would, in that case, that is to say, if it could not be sold under the statute, remain only a dry unprofitable chargeable pledge for that rent, in lieu of the productive security and enjoyment of the land. This, however, it is unnecessary for me to consider, inasmuch as, whether the additional rent in kind would embrace further considerations as to the law of the case or not, I think, for the reasons which I have before stated, that, having due

(*a*) c. 5.

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regard to every thing alluded to in the question proposed to us by your Lordships, the lease in question is invalid.

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PARK J. I shall answer the question proposed to the judges, very shortly; because I have so fully given my opinion upon it in another place, a full and accurate report of which, in two different books, is in the hands of some of your Lordships. And meaning, in what I am to trouble the house with, to adhere to the opinion I formerly delivered, I, of course, in answer to your Lordships' question must state, that, having a due regard to the true intent and meaning of the indenture of the 2d of *July*, 1757, according to the legal construction of the several parts of that indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th *Sept.* 1803, is, in my opinion, invalid.

I proceed to state to your Lordships, as the question requires, my reasons for so thinking. But, before I do so, I beg your Lordships to believe me, when I positively disclaim the notion, that I thus give my opinion to preserve my own consistency. I have often heard eminent judges so declare; but, surely, consistency in error is no credit to the man or the judge. For one, I should never be ashamed, (and I have lately acted upon that feeling) where my understanding is convinced that I had upon some former occasion formed an erroneous judgment, manfully and fearlessly to acknowledge it and, as speedily as possible, to retrace my steps.

The objections to this lease are two: *viz.* that it does not pursue the power, inasmuch as a clause is required to be in every lease in these words: "So as there be contained in every such lease *a* power of re-entry for non-payment

payment of the rent thereby to be reserved," and nothing more: whereas, it is said, this lease contains a power of rentry, not *generally*, but clogged with two conditions, — " Provided the rent, &c. shall be behind and unpaid, &c. *for* 15 *days*, and no sufficient distress can or may be had or taken upon the premises." And these two objections fall under very different considerations; but, it must be admitted, that, if either of them prevail, the lease is invalid. As to the general rules which govern the courts in the construction of leasing powers, they are all now well understood, and have been so fully explained and commented upon by some of my learned brothers, who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the House, to enter upon them: it being sufficient to state, that the intention of the parties, which is to be collected from the instrument, is to be the governing principle in the construction.

The words of the power having been read to your Lordships. " So as there be contained *a* power of re-entry for non-payment of the rent thereby to be reserved," it has been asked, " if a plain man were asked how he would execute such a power, what would he say?" I answer distinctly, that he would say, " insert a clause in the very words of the power, that the lessor shall have a power to re-enter for non-payment of the rent thereby reserved." I answer, that such a plain man, in my conception, would be grievously surprised to find two conditions, which he will in vain look for in the power; but which materially alter the rights of the remainder-man. The power to make leases is to be construed so as to lean neither to the one party nor the other; for the maker of the power certainly intended, that they should operate for the benefit of both: of the one by giving him the enjoyment, during his life,

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of an estate well cultivated; of the other (*viz.* the remainder-man) by preventing him from coming to an impoverished one.

It seems to me, that, to contend for what is insisted on by the Plaintiff in error, is to say, that "absolute" and "conditional" mean the same thing: or, that a power clogged with two conditions, is the same thing as an unclogged and unconditional power. When this case was before the Exchequer Chamber, I stated that, if the only objection to this lease were the time given, before the lapse of which he could not re-enter for non-payment of the rent as then advised, I should think the objection fatal. I have heard nothing since to remove my doubt. It is said, indeed, that, the indefinite article *a* being used, namely, *a* power, *any* power that is reasonable may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The court or the jury? If 15 days be reasonable, why not 20, 25, and 30? That this was never contemplated, I think, quite clear; for, whenever time is meant to be given, it is expressed, and, therefore, she must be presumed to have known, that, where she meant to give time, it ought to be expressed, lest the giving it in one case should be construed, as it is by me, that it was not intended to be given in the other. But I have said, and I repeat it, what right have we to insert the word "reasonable" into this power? If this word "reasonable" never found its way into powers, it might perhaps more fairly be argued that it was inherent in all. But, looking at precedents and adjudged cases, we do find the words "usual" and "reasonable" sometimes jointly introduced, sometimes separately; and these words, when introduced, compel the courts to consider what are usual,—what are reasonable covenants—under such powers. If, then, it is not unusual to insert such words,

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why are the courts to introduce them, where the creator of the power has not; and who, by omitting them, must be taken to have intended that they should not be inserted? But I am staggered by what is said in a book of great authority, and to which I think the professional public are much indebted (*a*), that, if this objection were to prevail, it would invalidate nine-tenths of all the leases in the kingdom granted under powers. I can only say, such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases have chosen to follow their own new fangled conceits, instead of using the exact words of the power conferring the right to lease upon certain terms, and upon certain terms only. This argument, that many leases will be invalidated, may be a very good one to your Lordships in your legislative capacity, on account of the hardship of the case; but cannot, and ought not to influence you when your province is *jus dicere, non dare*. However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble advice to your Lordships, that, on this ground alone, the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my judgment in the Exchequer Chamber, and since. I have turned it in every point of view, I have heard all that learning and ability at the bar could suggest, I have, of course, been present at all the conferences with my learned brethren, I have been most desirous to be convinced, if my opinion be erroneous; but, after all, I cannot raise in my mind a probable doubt; and, though, if the decision of your Lord-

(*a*) *Sugden on Powers.*

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ships should be ultimately in favour of the lease, it will be my duty to conform to that opinion, I am, at present, bound to state my entire concurrence in this point, with my learned brothers, *Richardson*, *Burrough*, and *Holroyd*, who have preceded me. Their luminous exposition of the argument, and my own judgment in the Exchequer Chamber, which is very accurately reported, both by Messrs. *Broderip* and *Bingham*, and by Mr. *Moore*, and which is in the possession of some of your Lordships, render it unnecessary for me to do more, on this head, than to make an observation or two on the cases that have been quoted.

The main reliance on the other side is on the case of *Hotley* v. *Scot*, *Lofft*, 316. Of that reporter I shall say no more than this, (without forming any judgment of my own) that, during a long professional life of 40 years, and *Lofft's* Reports embracing a period of that great man's life who then presided in the Court of King's Bench, during which, as to this part of them, there is no other reporter; (for the reports of the very learned person now at your Lordships' table (*a*), did not commence till 1774, nearly two years after Mr. *Lofft's*), I never heard them quoted three times in my life. But, without any observations of this kind, it is quite clear from that report, that none of the learned counsel then at the bar, neither Mr. *Dunning* nor Mr. *Bearcroft*, neither my Lord *Mansfield* nor any of the judges appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration, and which, from the terms of the power and lease in that case might have arisen. But, it is said, there is a note of that case by Mr. *Butler*, taken by himself, in which it appears to have been mentioned; I have not seen that note, and, therefore, I can say

(*a*) *Henry Cowper*, Esq.

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nothing to it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young; but, unless he be much more advanced in life than, for the sake of the public I wish him to be, he must, forty-eight years ago, have been a very young man. But, admitting the point to have been mentioned, it cannot have formed a prominent feature, either in the argument at the bar, or in the consideration of the court; for, if it had, it is impossible that Mr. *Lofft*, or any other man, in a report of four pages should have omitted it. Can such a case, for a moment, be put in competition with *Coxe* v. *Day* (*a*), where this clause was the main objection to the lease, a case most ably argued at the bar by the now chief justice of that court, and receiving the deliberate certificate of four very eminent judges, Lord *Ellenborough*, Justices *Grose*, *Le Blanc*, and *Bayley*? In the course of that argument Lord *Ellenborough* said, " There can be no doubt, that it is more beneficial to the owner of the estate to have a power of re-entry *at once* upon the tenant upon non-payment of the rent, within a certain time, than to have such a power only *in case* there shall be no sufficient distress upon the premises." And, in another place, when Mr. *Abbott* was strongly pressing on the court, that such a clause secured the landlord's object, namely, satisfying his rent more speedily than in any other way, Lord *Ellenborough* said, in answer. " In the one case it is to be secured from time to time by successive suits with the risk of sureties if the distress be replevied; in the other, it is secured, once for all, by the landlord's re-possessing himself of the land out of which the rent is derived." Can any one say, my Lords, that the one remedy is not more easy, more direct, and less circuitous than the other? — and that great man (Lord *Ellenborough*) again

(*a*) 13 *East*, 118.

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says, "Surely the direct power is more beneficial to the landlord." And the certificate of all the learned judges is in direct conformity with these *dicta* of Lord *Ellenborough*; for it is said, "We are of opinion, that the power of re-entry reserved in and by the said lease for non-payment of the rent is not made in conformity to the power in the settlement for granting leases of the freehold part of the said premises, and that the lease is void n that ground." Not having seen any report of the judgment of the Court of King's Bench upon this case of *Doe* dem. Earl *Jersey* v. *Smith*, I cannot tell whether this case of *Coxe* v. *Day*, was recalled to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned judges in the court below, that, at once, they doubted the propriety of that decision; and one of them says, "it is not law, for it is diametrically opposite to reason and common sense." (*a*) I am sorry to say I think directly the contrary; but I, for one, seriously object to this mode of getting rid of decisions, because they militate against our own notions. I agree with the pointed manner in which this was expressed lately in this house by the Lord Chief Justice of the Court of Common Pleas: and I hope I shall be excused for using his language. "If the law so settled is now to be considered unsettled, I know not on what foundation, in point of law, any decision can stand." (*a*)

But the case of *Coxe* v. *Day* is not a solitary case; for the question again, in about three years after, came under the consideration of three of the same judges who decided *Coxe* v. *Day*, namely, Lord *Ellenborough*, Judges *Le Blanc* and *Bayley*, with the addition of another learned person now no more (Mr. Justice *Dampier*), and who could not have decided as they did without deter-

(*a*) Vide *ante*, *vol.* I. 195. (*b*) Vide *ante*, *Rowe* v. *Young*, 273.

mining,

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mining, that such a clause as we are now considering rendered a lease void where the power did not authorise it. The case I allude to is *Doe dem. Vaughan* v. *Meyler* (*a*). The case was tried before the latter Judge at *Hereford*, who thought the objection, such as we have here, was one that went to the whole lease, though it was partly of lands of which the lessor was seised in fee, and of lands in which he had only an estate for life with a leasing power, provided there was a clause of re-entry for non-payment of rent for 15 days. The lease was not executed according to this power; for it added, "and if there be no sufficient distress;" but the Court held, though the lease was void, because not executed according to the power, yet it was good as to the land of which the lessor was seised in fee, and the Court apportioned the rent: which was an erroneous judgment, if the objection to the present lease be not a good one.

The case of *Rees, on the Demise of Powell* v. *King* (*a*) I formerly thought, and still think, sets this point at rest, by shewing that such a clause as this throws a burden upon the right of re-entry which the maker of the power never contemplated. That case has been so often mentioned, that it is enough to say of it, that it has decided, that before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress on the premises, he must shew, that every part of the premises has been searched, else he cannot say there was no sufficient distress. The judge who first decided this was well known to some of your Lordships, and no man will decry the knowledge of the late Mr. Justice *Heath*; and his opinion was confirmed by the Court of *Exchequer*. If the Courts of *Wesminster-Hall* were to overturn that decision, it would go a great

(*a*) 2 *M.* & *S.* 276. (*b*) *Forrest*, 19.

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way to shake my present opinion; but I do not learn, that any of my brethren are prepared to do so; and if, therefore, I feel myself bound, as I shall feel, to call upon any plaintiff in ejectment on the circuit, who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress before I permit such a plaintiff to recover, I cannot conscientiously advise your Lordships, that this lease is valid; most sincerely, however, wishing that, consistently with my honest opinion, I could do so.

Of one other point I must take notice, namely, that, as this lease contains a general clause of re-entry, it must, necessarily control the special clause. To that position, I, for one, at present, cannot agree; for I find the contrary doctrine maintained from *Altham*'s case (*a*) down to the present day. In *Altham*'s case we find this position or rather this maxim adopted. In the first part of the argument, putting every point that can possibly occur, his Lordship says, "*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundùm verba specialia.*" But he goes on to add, there is another rule or principle of law, viz. "*generalis clausula non porrigitur ad ea, quæ antea specialitèr sunt comprehensa.*" Therefore, I say, this point, for which I am now arguing, being first specially defined, cannot be enlarged by a subsequent general clause, which can only apply to cases not before specified or defined. So in *Sheppard's Touchstone* (which is supposed to be the work of no less a man than Mr. Justice *Doddridge*), on the exposition of deeds (*b*), in confirmation of the above doctrine that writer says, "If there be two clauses or parts of the deed repugnant to one another, the first part shall be received, and the latter rejected, unless

(*a*) 8 *Co.* 154. *b.* (*b*) *ch.* 5. *p.* 88. *fo.* 7.

there

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there be some special reason to the contrary." If we descend to more modern times, we find the same rule universally adopted and confirmed by judges on particular cases depending before them. In *Cother* v. *Merrick* (*a*) Mr. Baron *Nicholas*, quoting the Year-Books in support of his opinion, says (*b*) "When there are two clauses in a deed of which the latter is contradictory to the former, there the former shall stand." And, not to multiply authorities upon a point on which Lord *Ellenborough* intimated a strong opinion, when he expressed himself against the validity of an argument founded upon such a point, I shall only quote one more from what Lord Chief Justice *Holt* and two of his brethren said in *Thomas* v. *Howell* (*c*), that, "in deeds it was admitted, that subsequent clauses which are general, shall be governed by precedent clauses which are more particular." I therefore, think, that this ground does not, in any way, strengthen the argument as to the validity of the lease.

The point upon the statute of 4 *Geo.* 2. has been so ably handled, and so luminously explained by my learned Brother *Holroyd*, who has just addressed the House, that I shall not trouble your Lordships on that point, but to say, I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence? And, upon that point, I shall trouble the House very shortly. I am willing to admit that, if this deed upon the clause in question contains any latent ambiguity raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed. It would be of

(*a*) *Hardr.* 89. (*b*) *Hardr.* 94.
(*c*) 4 *Mod.* 69.

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most dangerous consequence to admit such testimony; for, then, parties dealing in matters on writing made upon advice and consideration, would be subjected either to the uncertain testimony of vague and precarious memory; or, as in the case at bar, to matter, of which at the time of contracting, they might have no knowledge, and never intended to be under its control. The written instrument, therefore, unless in cases of fraud, or other excepted cases, with which I need not trouble your Lordships, and of which I insist this is not one, must be considered as speaking the sense of the parties to that deed or instrument. Upon this ground it was, I conceive, that the case of *Cooke* v. *Booth* (*a*) met with such a decided opinion against it in *Baynham* v. *Guy's Hospital* (*b*), by Lord *Alvanley* when Master of the Rolls, who, not only states his own opinion, but that of the late Mr. Justice *Wilson*, who had argued the case of *Cooke* v. *Booth*, who, Lord *Alvanley* says, was astonished at the decision as well as at that of Lord *Thurlow*. The Master of the Rolls says, "I protest against the argument of the learned Judges as to construing a legal instrument by the equivocal acts of the parties and their understanding upon it." The case of *Tritton* v. *Foote* (*c*) seems directly at variance with *Cooke* v. *Booth*. In *Iggulden* v. *May* (*d*) the Court of Exchequer Chamber, unanimously affirming a judgment of the Court of King's Bench, held, that a covenant in a lease to grant a new lease, with all covenants, grants, and articles, as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in the renewed lease, although it was alleged in the pleadings, that the covenant required had been introduced in various other cases before then suc-

(*a*) *Cowp.* 819. (*b*) 3 *Ves. jun.* 298. (*c*) 2 *Bro. C. C.* 636.
(*d*) 2 *N. R.* 449. See the original case and pleadings, 7 *East*, 237.

cessively

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cessively made and executed on renewals from time to time granted. Lord Chief Justice *Mansfield*, stopping the then Mr. *Abbott*, who was to have argued against the construction contended for on the other side, said, that the case of *Cooke* v. *Booth* was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of a deed: and, in another part of his judgment, his Lordship says, that case had been impeached upon all occasions, and in which the Court of King's Bench were misled by the renewals stated in the case sent by the Court of Chancery. Now, what is asked for in the present case, but to assist the construction of an unambiguous deed by the prior acts of the parties? And, in a case which I argued as counsel (*a*), though the lease there was according to the custom of the country as to the times of holding, yet the lease, dated 29th *March*, was held not to be a lease in possession, within a power to grant in possession, and not in reversion, because the days of holding were as to the tillage from 13th *February* past, the pasture ground from 5th *April* next, and the residue of premises from 12th *May* next.

But, my Lords, in my opinion, no cases are wanting to prove, that no evidence can be admitted to explain a deed, which is plain and perspicuous in its terms, containing no ambiguity, much less to add clogs and conditions to it. I am asked then, is this a deed of that description? I answer that, in my opinion, it is. I see no ambiguity; it is precise and definite in the powers granted; every person of plain and common understanding, much more every person with a legal mind, can give it a clear and satisfactory solution. But, I am told, the case of *Fonnereau* v. *Poyntz* (*b*), before Lord Chancellor *Thurlow*, is against my opinion. I own,

(*a*) *Doe, dem. Allan & others*, v. *Calvert*, 2 *East*, 376.

(*b*) 1 *Bro. C. C.* 472.

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upon the best attention I can pay that case, I do not think so. The case was a bequest of the sum of 500*l.* stock in long annuities, and similar bequests of smaller sums in the same stock to others. The question was, whether this was a bequest of 500*l.* a year long annuities, or only 500*l.* in the long annuities. This case was very powerfully argued by one of your Lordships: I own I should have thought there was no difficulty in the construction; and Lord *Thurlow* seemed at first to be of that opinion, but afterwards admitted evidence to shew the extent of the property of the testatrix, to see whether she could possibly mean 500*l.* a year, when she had no such stock. But though his Lordship admitted this, he states the clear principle of law to be that, for the wisest reasons, it will not admit of an instrument being construed *aliundè.* And, in the close of that case, his Lordship says, what I quote to your Lordships as strong in my favour, because he only lets in the evidence to explain what is uncertain, "There is no doubt, if the word *stock* had been left out, but the meaning would be that the sum of 500*l.* was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises, whether the state of the testatrix's fortune is not applicable to the construction of the will. It appears by some other parts of the will that she was extremely anxious to make an ample provision for the family of the *Fonnereaus;* considering then, the situation of her fortune, it is perfectly inconsistent to say that she could mean to give ten times more than she was worth in legacies. My opinion therefore is, that the judgment must be reversed, and that I can let in the evidence of the value of the estate, not to control the bequests, which the testatrix has made in words themselves distinct, nor to control the bequest which

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which she had made of a subject which she had accurately described, but because the words she has used in the description are, upon the whole of the context, uncertain." "The peculiarity of this will furnishes sufficient doubt to warrant the admission of collateral evidence to explain it; and, if so, the statement of the testatrix's fortune is applicable to the purpose of such an explanation." His Lordship, whether right or wrong in his notion, clearly admits evidence *aliundè* on the ground of uncertainty and ambiguity only, and leaves the principle wholly untouched, that parol evidence, or evidence *aliundè* cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument. Now, here, the terms of this power are clear and express, without limitation, clog, or condition, nothing being doubtful or ambiguous; and the evidence sought to be admitted is not to explain that which is doubtful, but to add two clauses or two conditions to that which is absolute and unconditional: in short, to make a new deed in this respect.

The decision I am humbly recommending steers clear of all vagueness and uncertainty; leaving nothing to the variety of conflicting opinions. For, who is to decide what is reasonable? If the Judges, as I should be inclined to think, — but worse, if the jury are, — what can lead to such contrariety of decision? For we all know, in every transaction of human life, what is reasonable or unreasonable must depend upon the reasoning and feeling of every individual man who has to consider the question.

I heard it said, this will unsettle many leases. I lament that it is so. The legislature may interpose; but, if my mode of construing powers had been always adhered to, no such evil could have ensued. The hardship of the individual case is represented; and, if there be hardship, I also, as an individual, lament it; and this

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this statement of hardship, and the consequences of what I should propose, have made me, again and again, examine this point with all the ability in my power: but, after all this consideration, feeling, that it is my sworn, and therefore bounden duty to declare what I believe the law to be now, not to say what it ought to be, I think, that, to decide in favor of the lease, would be to make a power different substantially from that which was made, and making conditions which the creator of it never intended. This would be my opinion, if I stood, alone; but, I am happy not to be singular in my judgment on this important question, although I am opposed to others whose ability I respect, and whose learning I revere.

BAYLEY J. I am of opinion that the lease in this case is conformable to the leasing power, and that it is valid. Nor do I think that that opinion will trench on the case of *Coxe* v. *Day*. The settlement in this case requires "*a* power of re-entry for non-payment of the rent;" and the first question I propose to consider is, whether this lease does or does not contain "*a* power of re-entry for non-payment of the rent?" It provides, that, if the rent be behind for the space of 15 days, and no sufficient distress can be had upon the premises, the person intitled to the freehold and inheritance may re-enter. Is this then, or is it not, "a power to re-enter for non-payment of the rent?" Does it give any power to the landlord? Undoubtedly. — To do what? To re-enter. — For what cause? For non-payment of rent. It is, then, a power of re-entry for non-payment of the rent. I admit, it is not an immediate power of re-entry; I admit it is not an unconditional power; but still it is *a* power of re-entry. In referring to *Littleton*, s. 325. I find instances of powers of re-entry, if the rent be behind a week, or a month, or half a year; and, as far back

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back as the Year-books (*a*), it is established, that, under such powers, the time to demand the rent to warrant a re-entry is at the end of such week, month, or half-year, and not on the preceding rent-day; so that it is consistent with a power of re-entry, that it should not be immediate, but postponed till some given time after the rent should have accrued; and in *Godbolt* (*b*) I find the instance of a power of re-entry, if the rent be behind, and there be no sufficient distress upon the land; and, from these instances I infer, that a power of re-entry, if the rent shall be behind 15 days, and there is no sufficient distress upon the premises, is "a power of re-entry for non-payment of rent." It may not be the most beneficial species of power; it may be clogged with what, in some cases, may, by possibility, produce an inconvenience; but still it is a power. And, if it be a power of re entry for non-payment of the rent, this lease does contain what (in the words of the settlement) is "a power of re-entry for non-payment of rent;" and persons who impeach the lease are then driven to the argument, that, though it be *a* power, yet, it is not such a power as, having due regard to the intent and meaning of the indenture of the 2d *July*, 1757, that indenture according to legal construction requires. Now this argument assumes, that the words are capable of more than one meaning, if they are not so clear and precise and definite, as to admit but of one sense; and, it was to point out this assumption, that I have been troubling your Lordships upon what might, otherwise, have appeared nearly a self-evident proposition. The words are "a power of re-entry for non-payment of the rent." The law knows of many such powers; — some more beneficial, some less so — some qualified — some not —

(*a*) 20 *H.* 6. 30. 31. 6 *H.* 7. 3. *Brooke, entre congeable, pl.* 90.
(*b*) 110, *pl.* 130.

some

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some to hold the land till the rent is satisfied out of the profits; — some to hold till the rent is satisfied *aliundé* (a); — some, as here, to restore the reversioner to his former estate; — and some with the conditions I have already noticed, *viz.* postponement of time, and absence of distress upon the land; — and some (though very few) with neither of these conditions. And which of these powers, having due regard to the intent and meaning of the indenture of 2d *July*, 1757, does that indenture, according to legal construction, require? The intent and meaning of that indenture is to be collected, either from that indenture, without looking out of it or beyond it, or from that indenture, combined with the consideration of the state of the property at the time when that indenture was made, if the evidence of the then existing leases, and of the powers therein contained (which I shall by-and-bye consider), be admissible. The intent and meaning of that indenture (*per se*, and without looking beyond it or out of it) was, as it seems to me, that the reversioner should have such of those powers as would give him *a proper and reasonable security* for his rent, by way of re-entry; and that, if nothing short of a right of immediate re-entry, and of re-entry, whether there were or not a sufficient distress upon the land, would give him that security, I should say, he was intitled to such a power in the lease as would give him those rights; but, if any of the other powers would give him a proper and reasonable security, it seems to me that giving him any of those other powers would be all the indenture of 1757, according to legal construction, requires. The rent is not a rack-rent. It is only 2*l.* 1*s.* 6*d.* *per annum*, payable half-yearly; and for a lease for three lives the lessees surrendered a subsisting lease, upon which, at least, one life was *in esse*, and

(a) *Co. Litt.* 203. *a.*

paid

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paid 105*l.* A half year's rent, therefore, would be 1*l.* 0*s.* 9*d.* only; and, for such a rent, a delay of 15 days was not likely to occasion the reversioner much probability of loss; it was not likely the premises would ever be so completely deserted as to have no sufficient distress upon them; nor was the rent such as could be any inducement to the tenant to replevy. For such a rent, the power in question to re-enter at the end of fifteen days, if there were no sufficient distress upon the premises, appears to me an adequate and reasonable security; and I should be disposed to think that, for such a rent, a clause without giving any days of grace, would be unreasonable; because I think the immediate exercise of such a right would be oppressive. Nor do I think it unreasonable to deny the reversioner the power of re-entry where there is a sufficient distress upon the premises, because the legislature did not think it unreasonable to deny the landlord the benefit of 4 *Geo.* 2. *c.* 28., where there was such a distress; and because a landlord can have no difficulty in ascertaining whether there be such a distress or not. He has a right to enter with his bailiff upon the premises, to see whether there be such a distress: and, according to *Godbolt* (*a*), if there be nothing that he can see upon the premises to distrain, he is warranted in concluding that there is no distress there. *Godbolt*'s words are, "It was holden by all the Justices, that if a man make a lease, rendering rent upon condition, that, if the rent be behind, and no sufficient distress upon the land, the lessor may re-enter; if the rent be behind, and there be a piece of lead or other thing hidden in the land, and no other thing there to be distrained, the lessor may re-enter; for the distress ought to be open and to be come-by." I am, therefore, of opinion that, without looking beyond the indenture of *July*,

(*a*) 110.

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1757, the power in question is, within the true intent and meaning of that indenture and the legal construction thereof, as large and beneficial a power of re-entry as that indenture required.

But, I apprehend, that, in judging of the true intent and meaning of the indenture of *July*, 1757, in this respect, we are at liberty to look at the state of the property at the time that indenture was made, and see to what restrictions it was then subject, and what rights the settlor then had. The settlor has used the indefinite words, "a power of re-entry." By shewing, as I do, that there are many such powers, I shew, that there is an ambiguity in those words, either latent or patent; and may I not refer to the existing state of the property at the time these words were used, to see what was the intention of the settlor, and in what sense she used those words? This is the first time I have ever known it doubted, whether the estate, and interest, and powers of the settlor over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant; I am not construing a legal instrument by the acts of the parties, or by their understanding upon it (as in *Cooke* v. *Booth* (a)); but, by shewing the circumstances and situation of the party, and the estates and interest she had at the time, I am enabling the House to judge what, in legal construction, was her meaning. And, I am not aware, that there is any legal authority to exclude the evidence of such circumstances and situation. *Doe* v. *Calvert* (b) certainly is not. That case only decided, that a lease of 29th *March* of tillage land from 13th *February* preceding, of pasture land from 5th *April*, and of the residue from 12th *May*, reserving the rent in *April*, was substantially a lease from *April*, and, therefore, a lease not in pos-

(a) *Cowp.* 819. (b) 2 *East*, 376.

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session but in reversion; and the custom of the country, that these were the ordinary periods of letting was admitted without objection, and argued upon without objection, but was held not to contract the power so as to warrant a lease before *April*. If a man makes any deed or will, have I not a right to know what estate he had at the time he made such deed or will; and, does not the construction vary, in some cases, according to the estate? If I grant a man an estate for life, without saying whether for his life or mine, is not evidence admissible to shew what interest I had in the premises? For, if I was tenant in fee, he will take an estate for his own life; if I was tenant in tail or for life only, he will take for mine (*a*). If a man bequeath me 10,000*l.* 3 *per cent.* consols., it will be a specific legacy if he have that stock at the time; — not specific, if he have it not, *Selwood* v. *Mildmay* (*b*). Evidence is, therefore, admissible in such case to shew what was the state of his property at the time he made his will, and the construction upon the will is one way or the other, according to the result. In *Masters* v. *Masters* (*c*), where a lady by her will gave 5*l.* to each of two hospitals in *Canterbury*, and by her codicil gave 5*l. per annum* to "all and every the hospitals," the latter legacy would have been void for uncertainty; but it appearing (which must have been by extrinsic evidence) that the testatrix lived at *Canterbury* for many years, and died there, and that she took notice by her will of two *Canterbury* hospitals, the general words "the hospitals" were limited and considered as intended for "all the hospitals in *Canterbury*." But the case to which I wish to call your Lordships' particular attention is *Fonnereau* v. *Poyntz* (*d*). The testatrix, there, gave to *Mary Poyntz* the sum of 500*l.*

(*a*) 1 *Shepp. Touch.* 88.
(*b*) *Per M. R.* 1797. 3 *Ves.* 310.
(*c*) 1 *P. Wms.* 421.
(*d*) 1 *Bro. C. C.* 472.

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stock in long annuities; — to *Mary Haye* the sum of 500*l.* stock in long annuities; — to Miss *J. L. Barbauld* the sum of 200*l.* stock in long annuities; the interest thereof to accumulate till she attain 21; — the sum of 100*l.* stock in long annuities to Miss *H. Dawson* in like manner; — and the residue of her estate both real and personal to her two nephews. Parol evidence was given that the testatrix had only 120*l.* *per annum* long annuities; but Lord *Thurlow* doubted at first, whether he could admit that evidence to explain the words; and he afterwards decreed against receiving it, because he thought it would produce a construction against the direct and natural meaning of the words. But, upon a re-hearing, he admitted the evidence, and acted upon it; — and the ground of his decision was, that, upon the face of the will itself, it was doubtful whether the testatrix meant to give legacies of 1300*l.* *per annum*, or only a gross sum of 1300*l.*; and he considered the state of the testatrix's fortune applicable to the construction. The situation of the fortune made him conclude, she never could have meant [illegible] in legacies ten times more than she was wo[illegible] let in the evidence not to control a beq[illegible] distinctly and accurately described, b[illegible] upon the whole context, *it was uncertain* [illegible] so much *per annum* or so much [illegible] thought the peculiarity of the will [illegible] doubt to warrant the admission of collateral evidence to explain it; and that the statement of the testatrix's fortune was applicable to the proof of that explanation. Lord *Thurlow* decided this, therefore, as a case of ambiguity; — as a case, in which, from the use of the "*sum of* 500*l.* stock" and the interest [illegible] thereof," he might let in the extrinsic evidence of the circumstances of the testatrix to explain what was her meaning. In noticing this

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this case (a) Lord *Alvanley* says, Lord *Thurlow*'s only doubt was, whether parol evidence was admissible to ascertain whether the testatrix did not mean capital, but *he had no doubt he must know all the circumstances of her affairs.* Apply that case to this. The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinct and accurately described; but because there is an ambiguity upon the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one: and I look to the state of the property at the time, to the estate and interest the settlor had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation would assist us in judging what was her meaning by that indefinite expression. And, then, the case will stand thus: — Lady *Louisa Barbara Vernon* being tenant for life with power of appointment in fee of a very considerable estate, part of which was then out upon leases for lives at small rents, payable partly in money and partly at her election in fat capons, subject to powers of re-entry if those rents should be behind 15 days and there should be no sufficient distress upon the premises, settled that estate with powers to make life leases of that part of the estate at the ancient rents, so as those leases should contain *a power of re-entry* for non-payment of the rent thereby reserved; and with power to make leases at rack-rent of the other parts of the estate, so as those leases should contain clauses of re-entry if the rent were in arrear 28 days; and, then, the question is, whether, by requiring upon the life leases generally " a power of re-entry," she required more than that description of power which the

(a) 3 *Ves.* 320.

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then life leases had. She must be taken to have known what that power was; and had she been dissatisfied with it, or required any alteration, can it be supposed she would have contented herself with the indefinite expression "a power of re-entry?" When she is providing for the rack-rent leases, where the right of distress is much more important, she gives the tenant 28 days; and, can it be believed, that she intended to be less indulgent where the rent bore scarcely any relation to the value of the property? I cannot believe she did; and for these reasons, because the settlor has not said what particular species of power she required, and this is a reasonable power, and the very power in force upon this estate at the time this settlement was made. I submit to your Lordships, that this lease was warranted by the power, and that the judgment of the King's Bench ought to be affirmed.

Wood B.

WOOD B. My Lords, — In answer to the question proposed by your Lordships, which is,—"Whether having due regard to the true intent and meaning of the indenture of the 2d *July*, 1757, according to the legal construction of the indenture, as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th *December* 1803, as the same is stated in the special verdict, is for any and what reasons invalid?" — I am of opinion that the power contained in the marriage settlement is well executed.

That power applies to lands "leased for lives or for years determinable on lives, to any person or persons in possession or reversion;" and one of the conditions of such letting is in these words, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." There is another power of re-entry which applies to leases

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leases for years absolute, not exceeding 21 years, to take effect in possession, and to be made at as beneficial yearly rent as was then paid, or the most improved rent without fine or foregift; and there it is provided, that there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of 28 days after the time appointed for payment.

The lease in question is under the first power, which provides re-entry on non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. The proviso in the lease in question is, — if the yearly rent of 2*l.*, or any of the duties, services, reservations, and payments thereby reserved shall be behind, unpaid, or undone in part or in all, by the space of fifteen days after any of the times of payment or performance, and no sufficient distress or distresses can be had or taken whereby the same and all arrearages may be raised. It is contended on the part of the Defendant in error, that this proviso of re-entry in the lease is not such a one as is required by the settlement, inasmuch as it has limited a time for re-entry, which the power has not; and, inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention.

The clause requires no more than a power of re-entry for non-payment of rent, giving it no qualification or modification at all. There is a clause of re-entry, and that is a literal compliance. But though the power is general, I admit it must be executed, not in a fraudulent or illusory manner, but in a reasonable manner; such as the law will deem reasonable. In the clause of re-entry for the rack-rent, the time is limited, viz. 28 days. I admit that cannot be departed from. Why was no time limited in this? Because the settlement meant to leave it to the discretion of the tenant for life, to insert

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such a reasonable power of re-entry as might secure the rent to the reversioner. The object of re-entry is merely to secure the rent, and has been always so considered in law and equity; and when I see that object is secured reasonably and fairly, and we are not tied down to any specific terms, I think the power is well executed, being according to the intention of the parties. I think we ought to consider the deeds and acts, *ut res magis valeat quam pereat*. In *Cother* v. *Merrick* (*a*) in the Exchequer, on a special verdict, the question was, whether the lease was a good lease within the statute 32 *H.* 8. c. 28. That statute is to enable tenants in tail to make leases to bind, as if they were tenants in fee simple. The second section is, provided such leases be not for more than 21 years, and provided that upon every such lease, there be reserved payable to the lessors, their heirs and successors, to whom the said lands should have come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interest, so much yearly ferm or rent, or more, as had been accustomably paid. The lease was made reserving the rent to the heirs and assigns of the lessor, who were not the heirs in tail entitled to the rent, yet it was held a good lease. *Hill* B. says, "In the exposition of statutes, the judges must make such a construction as to advance, and not to frustrate the intention of the makers." *Parker* B. says, "It is the office of a judge to preserve and not to destroy an estate." In this case the judges gave their rational construction to the lease, which gave it effect. So, here, in this case before your Lordships, I conceive we ought to do the same, taking the true interpretation of the power to be to leave the mode of re-entry to the direction of the lessor. Has that been

(*a*) *Hardr.* 89.

fairly

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fairly and *bonâ fide* and reasonably executed? Is the period of 15 days a reasonable time to allow for re-entry? In the case of rack-rent, 28 days is expressly given; if the parties have thought that a reasonable time, surely, the 15 days must be; it is the usual time as found by the jury; the law will judge what is a reasonable time.

The last objection, which was mostly, if not entirely, relied on, was the clogging the right of re-entry with the condition of there being no sufficient distress. Is that reasonable, with reference to the law, as it stood, when the lease was made? I conceive it is. The 2d *July*, 1757, was the date of the deed of settlement, which gives the power of leasing, and which was subsequent to the statute of the 4 *Geo.* 2. *c.* 28., which was in the year 1731, which regulates the powers of re-entry for the non-payment of rent. Before the making of this statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety. There must have been a demand of the rent upon the land; if there were a house, it must have been demanded at the fore door; and it must have been demanded at a convenient time before the sun-setting of the last day of payment, so as that money might be numbered and received. The landlord then had to make an actual entry and bring an ejectment. If all these circumstances were not *critically* and *exactly* performed, he lost the right of re-entry for that time, and was forced to wait till other rent occurred; and then had to make fresh demand and re-entry for the subsequent rent. If he had complied with these formalities, and brought his ejectment, it was the uniform practice of a court of equity to relieve against a forfeiture upon payment of the rent and costs, considering the clause of re-entry as a mere security for payment of rent. What is the alteration made by the statute? It has dispensed with the form-

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alities attending re-entries at the common law, and said that when the landlord has a right to re-enter, and half a year's rent is in arrear, he shall and may at once bring his ejectment, and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due. The tenant, also, may pay or tender the rent and costs to the landlord or his attorney, or pay the same into court before trial, and all proceedings shall cease. The policy of this law is to prevent forfeiture for non-payment of rent, and to facilitate the landlord's remedy for the recovery of it: and, at the same time, the legislature has thought it right to impose this condition: — you shall not eject the tenant if there be a sufficient distress to secure the rent; you may have an action or a distress as soon as the rent is due, without waiting fifteen days. It is said, "still the statute leaves the common law remedy open to a landlord, if he will comply with the formalities of demand at the last hour of the day, and make re-entry; and, in that case, the necessity of distress is not imposed on him." What then? Why the tenant will be relieved against the forfeiture in a court of equity; yet it does not seem clear, even in that case, that the statute does not shut the door against proceedings by re-entry at the common law; but, upon that, I do not found my opinion. The words of the statute are, "that the landlord shall and may bring ejectment;" and *shall* is imperative. Under the statute of 8 & 9 *W.* 3. *c.* 11. — An act for the better preventing frivolous and vexatious suits in actions for penalties for non-performance of covenants, — the plaintiff *may* assign as many breaches as he shall think fit. It was at first contended that the statute was not compulsory on the plaintiff to assign breaches; for, that the statute was made for his benefit, and therefore he might waive it, and leave the defendant to his remedy in equity: but all the courts in *West-*

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minster Hall held it to be *compulsory* on the plaintiff to assign breaches and assess damages, and the defendant shall not be put to seek relief in equity. This is the fair construction to be put on the statute of the 4th *Geo. 2.*, where the words are stronger, being "shall and may;" and, upon the same principle, if this be the true construction of the statute, and there is no decision to the contrary, then there is an end of the question; for the lease will then have expressed no more than that condition which the statute requires. It might not be necessary to express the condition, because the law imposes it. But I will suppose it to be left open to the landlord to proceed in the old way, as before the statute, and a reasonable clause of re-entry is all that the power required; can the adoption of the same condition which the legislature has adopted in similar cases, be considered as unreasonable? The case of *Coxe* v. *Day* (*a*) has been cited as an authority of the Court of King's Bench, that the inserting a condition of re-entry in a lease made under a power in these words, "in case no sufficient distress can be taken on the premises," they not being in the power, was not a good execution of that power. I doubt very much the propriety of that decision; but, be that case as it may, it is different in one material feature from the present case. The re-entry required was for non-payment of the rent reserved by the space of twenty-one days; so that there was a specification of a particular mode, and therefore it, perhaps, might be inferred no other qualification would be warranted. Here no time is limited: a power of re-entry *generally* is all that is required; and, therefore, I think reasonable qualifications may be made.

In this present case, which was only a few years afterwards, the same court thought this power well executed.

(*a*) 13 *East*, 118.

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They must have thought their former decision was wrong, or that this case was distinguishable from it: Lord *Ellenborough* and Mr. Justice *Bayley* sat upon both those cases. But, whatever may be the construction upon the statute of the 4 *Geo.* 2., I do not rest my opinion upon that. My opinion is founded upon this, that the power of leasing leaves it to the discretion of the lessor to make a reasonable lease; and that the power of re-entry, which is contained in this lease, is a reasonable one; and, therefore, I think that the lease is not invalid.

Graham B.

GRAHAM B. In answer to the question proposed by your Lordships, I have to submit, that, in my opinion, the demise of the 5th *September* 1803, is valid; and as so much difference of opinion appears to exist on the subject, I feel it incumbent on me to offer to your Lordships the reasons which have led me to the formation of mine.

My Lords, the question arises out of the settlement of *Louisa Barbara Mansel* (made on her marriage with *George Venables Vernon*, afterwards Lord *Vernon*,) of the 20th *July* 1757, to the uses of the parties, and issue of the marriage, and finally to the use of her appointment by will, and in default of such, to her right heirs. Lady *Vernon*, by her will of the 5th *August* 1803, gave the lands demised to her by her father, Lord *Mansel*, and included in that settlement, subject to her husband, Lord *Vernon*'s life estate, to Thomas Lord *Clarendon* for life, (who is since dead,) remainder to *William Augustus Henry Villiers Mansel* in fee, under whom the lessors of the defendant in error claim.

Lady *Vernon* died in 1786, and Lord *Clarendon* and Lord *Vernon* before the day of the demise. The proviso in the settlement which raises the question, is this, "That it shall be lawful for *George* Lord *Vernon*, and Lady *Vernon*,

Vernon, from time to time during their respective lives, when in possession, or entitled to the rents and profits of the lands so limited, to demise on lease such parts of the lands as now are leased for life or lives, or for years determinable on the dropping of a life or lives, to any person or persons in possession or reversion, for one, two, or three lives, or for any number of years determinable on the dropping of one, two, or three lives, so as there be not any greater estate or interest subsisting at one time, than what will determine on the dropping of three lives, and so as on every such lease *there be reserved the ancient and accustomed yearly rent, duties and services*, or more, or as great *as now* are, or *at any time* were reserved, or a just proportion, (except heriots, which may be varied, altered, or compounded for, at the will of Lord and Lady *Vernon*,) such rents, duties, and services to go along with the reversion, or remainder of the premises expectant on the determination of such leases; " and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." There is, then, the usual power of leasing the other parts of the lands, for years not exceeding 21; " so as there be contained a clause of re-entry in case the rents be behind, and unpaid, by the space of 28 days after the times appointed for payment thereof." Thirdly, a power of leasing mines guarded only by the usual covenants.

On the 5th of *September* 1803, Lord *Vernon*, then tenant for life, executed the lease in question. It contains, after the usual reservation, a covenant for the lessees to pay yearly at *Michaelmas*, and *Lady-day*, the yearly rent of 2*l.*, and the said duties, heriots, &c.; there are other reservations, such as a pair of fat capons, or 1*s.* 6*d.* at the election of the person entitled to the rent, a heriot of 40*s.* and also doing suit of mill at the mill of Lord *Vernon*, or other person entitled to the inherit-

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inheritance. All these directions are strictly observed in the lease, yet how the penner of the lease was enabled to be correct in those reservations, but by the aid of the then subsisting, or former leases, I cannot readily conceive. But it seems he is mistaken, though with the same guides, in the clause of re-entry for non-payment of rent; for it is said he has unwarrantably, and without authority or power, given 15 days' respite, and annexed a qualification that no sufficient distress can or may be had on the premises, whereby the arrearages of this 1*l.* half-yearly rent may be fully raised, levied, and paid.

And the question is, whether this lease with a clause of re-entry so qualified, is a proper and valid execution of the power created by the settlement? Whether it be so or not, must depend on these considerations, viz. whether it is substantially conformable to the intention of the creator of the power, suitable and adequate to its object and purpose; and not injurious or inconvenient to the person next in remainder or succession.

I will not trouble your Lordships with cases, to shew that powers of this kind should receive a liberal construction. I ask only the construction of plain common sense: but, as these powers pervade the settlements of all the great and potent families of the kingdom, it is important that the execution of them should not be avoided on slight or immaterial departures, even from a prescribed form, still less where no specific form, but a general direction is given. A prudent father, tenant for life, with such a power, makes his leases with the fairest intention; he provides for his wife and younger children by his savings and personal estate; his eldest son succeeds him, and, upon an objection of this kind, avoids his leases, and the personal estate of the father is exhausted to indemnify the lessees. This consideration would, I may presume, dispose your

Lordships

Lordships not to be rigid in the construction of the execution of these powers, but to give effect to them when they are fairly and honestly executed, and without injury, or sensible inconvenience to the remainder-man.

What, then, did the maker of this power mean by the words "so as there be contained in every such lease a power of re-entry for non-payment of the rent?" The maker does not say what power, — he prescribes no form of the clause. What is it, but a general direction to insert a clause of re-entry because of non-payment of rent, that is, where the rent is not duly paid? This general direction was never intended to be inserted verbally in the future lease; it left the verbal exposition and specific form of the clause to further care and provision; no conveyancer would think of transcribing the terms of this general direction. Besides, "*a* power of re-entry" for non-payment of rent necessarily implies a selection of one out of several. It might be a power of re-entry at common law, or under the statute, or, what is likeliest of all, a power such as had been inserted in all former leases of the same subject, and in the very lease which was surrendered to make way for the present. I repeat it, therefore, that this general direction necessarily calls for the exercise of judgment in preparing the clause. I speak not of a definitive judgment, that must ultimately rest with a court of law, or equity; but of a judgment of the person who executes the power, or his conveyancer, as to what power is meant; the answer to which, to me, appears obvious, clear, and necessary, — a power fit, suited, and adequate to the occasion. Then, what is the object and occasion? The coercive means of enforcing the payment of rent: for my error, if it be an error, is this, that clauses of re-entry are intended for that purpose only, and that courts of equity would, at no time, suffer them to be used for any other purpose; and that, if the clause of

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re-entry in this lease had been unqualified, as it is contended it ought to have been, a court of equity would have enjoined the landlord, on payment of the rent in arrear, and costs; so that the remainder-man would not have been at all the better for the unqualified clause. Looking, therefore, at this general direction as referring to the exercise of some judgment or discretion to be used in the formal execution of this power, let me consider in what manner a tenant for life most anxious to execute it with scrupulous fidelity, would act. He would consult his man of the law. This lawyer reads this general direction, he finds he must look into former or subsisting leases, to know, first, what lands were formerly letten for leases; secondly, what the rents were before, and at the then moment; thirdly, what heriots had been heretofore reserved, what duties, what other reservations were to be made and secured. Could he forbear, or would he be bound to forbear to look into the clause for non-payment of these nominal rents? Were he so bound, I should much regret that the law had established a rule which excluded the very best information he could obtain. But suppose that he must shut his eyes to those clauses in former leases and in the very subsisting lease of the same lands, he must, in the first instance, consider what is a fit and proper clause for the purpose. He would naturally say, I cannot pen this clause in the language of the settlement; and, if I make it without any qualification by a more obvious and easy means of obtaining the rent, I make it a re-entry at common law, with all the inconveniences attending it, and its ultimate control in a court of equity. He would, therefore, conclude that he had better take the statute of the 4th *Geo.* 2d. *c.* 2. for his guide, and pen the clause in the manner which that statute seems to have pointed out, on a view of the law and equity applicable to that subject. I cannot be supposed to mean

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mean that this first exercise of judgment in preparing a proper clause could ultimately weigh, if, in the execution of the power, the lawyer had misconstrued its meaning and the intention of the maker; nor can I be supposed to mean that the validity of the execution of the power could properly be left to a jury; — the decision on that point could only be by a court of law or equity.

I have said that the clauses for re-entry in the former and subsisting leases were a proper guide to the exercise of discretion in preparing those clauses; but I say it, subject to the doubt which some may entertain; and, if I am not allowed to use that evidence, I do not feel that the argument in support of my view of this question is much impaired; though, with that evidence, the point is decided. But I take this to be a case very different from *Cooke* v. *Booth*, which I know has been over-ruled by many subsequent approved decisions. In that case the Court of King's Bench were called upon to put a construction on a written and explicit covenant of no ambiguity, or if any, of a patent ambiguity; it was a covenant to grant a new lease, on the dropping of one of three lives, for the lives of the two remaining and the third life under the same rents and covenants. But this is not a question on the language of a written instrument; it is impossible to contend, that it should be literally transcribed into the clause; it must have some modification: and, if you admit any, you admit the exercise of common sense and the consideration of the fitness and propriety of the power; and, to my apprehension, you admit enquiry as to what clause of re-entry the settlor meant. She has bid you look to former leases as to the lands so usually letten, the usual rents, heriots, services, and covenants for their recovery, and for doing suit at the mill; has she not, therefore, bid you look for what was the usual and proper clause of re-entry for non-payment of those nominal rents?

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This extrinsic evidence is not resorted to for the purpose of explaining the written and unfolded language of an instrument, but as a guide how to unfold, and prepare a future instrument under a general direction, to observe in all particulars what had theretofore been done. That is the substance of all the restrictions; — "do, as has been done heretofore." But I do not wish to involve the case in this discussion; though, for my own part, I think, the facts found by this special verdict and rightly admitted in evidence decide the question.

As to the question arising on the assumption, that the giver of the power meant that the clause of re-entry should be simple and absolute, it is said, with great impression on many, that there is a manifest distinction between a simple power of re-entry, and a power clogged, as it is said, with a condition or troublesome qualification; but the question is not on a difference in terms, but on a difference in substance and effect; a difference which may sensibly injure the remainder-man; not on a difference which leaves him effectually in the same situation, or, as I think, in a situation which may be proved to be better. To judge of this, let me suppose, that a clause, such as has been suggested, had been inserted in the present lease; — how would it have availed the remainder-man? He must have begun by a demand of his rent of 1*l.* at proper time and place. It is hardly necessary to quote *Co. Litt.* (*a*) to shew with what punctilious and expensive accuracy this must be done; the preamble of 4th *Geo.* 2. sufficiently shews how much those niceties were felt as impediments. He must then, with as much trouble and expense serve his ejectment, and for a rent arrear of 1*l.*, and he is immediately met, first, by the disgrace of such a proceeding, and then by a bill in equity, with a tender

(*a*) 153 *a.* 154 *a.* 201. & 202.

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der of his 1*l.* and costs. I may presume, that it was the knowledge and prevalence of this equity, that gave occasion to the statute 4th *Geo.* 2d. which empowered the courts of law to exercise the equitable jurisdiction, and provided, on the one hand, an easier remedy for the landlord to enforce the payment of his rent; and, to the tenant, a more prompt and less expensive relief, when powers of re-entry were abused. I do not contend, that this statute has taken from the landlord his right of reserving to himself a power of re-entry absolute; but, it excludes him from all benefit under the statute, if he does not pursue the steps which it points out; and, when a question arises, as here, of a fit and proper power of re-entry for non-payment of rent, what better guide presents itself for the judgment of a man, who is to prepare the clause, than the directions of a statute framed on the view of all the legal rights of the landlord, and the equitable relief of the tenant? And, we may remember, that, when this power was created, the statute of 4 *Geo.* 2. had passed many years, and its operation was known and prevalent.

My Lords, I have said, that the giver of this power meant by the words used, a power fit, and suited, and adequate to the occasion; that is, to its proper and allowable use, the security and enforcement of the payment of the rent: and, I take it for a clear principle of equity, that the landlord shall use it for no other purpose. But, two inconveniencies are pointed out, as affecting the remainder-man; first, that of proving that there was no sufficient distress on the premises; secondly, the delay and expense of a replevin. The first is applied to an estate for lives, where the rent is merely nominal and intended only to preserve the relation of landlord and tenant and the right to future fines. It is almost impossible to suppose property of that kind so dismantled as that the landlord should be put to any difficulty

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difficulty to find a cow, or horse, or piece of furniture to pay a rent of 1*l.*: and, with respect to the second difficulty, the same may be said of the improbability of any replevin for so small a rent. But, the best answer is, that, if the clause of re-entry stand ever so absolute, the tenant, though he would not be heard in equity to say that there was a sufficient distress on the premises, could stay the proceedings at law on payment of the rent and costs; for, I take it, that it was always and originally in the jurisdiction of a court of equity to relieve against clauses of re-entry for non-payment of rent, where the tenant was ready to pay the rent, or to give better security, if required, for the punctual payment of it; whatever doubts the courts of equity might entertain of clauses of re-entry for breaches of other covenants, where it might not be so easy to place the landlord in that situation with regard to his property, which he had a right, by all means, to secure to himself.

My Lords, with respect to the cases cited, I shall confine myself to a very few observations on only two, — those of *Coxe* v. *Day* and *Hotley* v. *Scot*. With respect to the former, I am reported to have expressed myself too strongly by saying, that it was contrary to law and common sense; and those expressions have been justly animadverted on by one of my learned Brethren. I do not recollect to have used such expressions, as applied to that case; but, if in the warmth of argument, any such expressions did escape me, I have only to regret that I have been so faithfully reported. This, however, I may say, that, from my manner of introducing my own opinion, I could not fairly be understood to mean an attack on that authority so unbecoming. I certainly mentioned that case as standing in the way of the present decision, and opposed to it the contrary decision of *Hotley* v. *Scot*, that, in that equipoise of authorities, I might more fairly exercise my own

own judgment; and I said upon that occasion, what I now repeat, that, notwithstanding the imperfect printed report of *Hotley* v. *Scot*, it is impossible to read Mr. *Butler*'s note, (whatever may be said of his then youth and inexperience,) and not to see, that the point of the effect of a qualification similar to the present was distinctly made, argued upon, and over-ruled; — Lord *Mansfield* saying, as I apprehend, with perfect accuracy and truth, that the clause was a reasonable one and conformable to the statute of *Geo. 2.*; and that clauses of re-entry for non-payment of rent were, in equity, considered only as the means of enforcing the payment of it. But, perhaps, your Lordships may think the case of *Coxe* v. *Day* distinguishable from the present. The observation of my learned Brother, who first delivered his opinion, is material; and, in that case, there was no reference, nor necessity of reference, to former leases, as to what lands should be letten, what ancient rents, what heriots, *suits*, duties, or services should be secured. It was a power to lease *any* of the lands, with the single qualification, that the leases should reserve the best and most improved rents.

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The decision of the Court of King's Bench in the present case, may be thought to throw some doubt on *Coxe* v. *Day*; and, all the cases considered, the present is open to your Lordships' decision. I humbly offer my opinion, that the lease in question is not, for any reason that I can suggest, an invalid execution of the power.

Richards C. B.

RICHARDS C. B. My Lords, the question arises upon a deed of settlement made on the marriage of Lady *Vernon*, by which her Ladyship was made tenant for life with remainder to Lord *Vernon*, her intended husband, for life, with powers of leasing, which were given to each of them as they should happen to be in

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possession of the premises. One power is to lease the mineral lands, in which there is no clause of re-entry at all; the power mentioned secondly in the settlement, is to grant leases at a rack-rent, with a proviso for re-entry in case the rent be in arrear for 28 days: In that case, there is a power of re-entry required in the lease to be granted for non-payment of the rent; but, there is an extension of the time from the days fixed for the payment of the rent to 28 days. The clause is to be introduced into a lease, in which the rent and the occupation run together, and are considered as of the same value, the rent is paid and payable for the year, during which the enjoyment of the premises has been had; yet, by the power in that case, there is expressly an extension of 28 days given for the payment of the rent. The power now in question, my Lords, authorizes Lord and Lady *Vernon*, as each of them shall come into possession of the premises, to grant leases of such parts of the land as were then leased for life or lives, so as there be reserved the ancient and accustomed yearly rents, duties, and services.

My Lords, it seems to me impossible to ascertain what lands were then leased for life or lives, without looking into the leases and other instruments, which were produced at the trial; and the production of the same instruments is equally necessary to show what the ancient and accustomed yearly rents were. In this view of the case, as it seems to me to be impossible to consider the effect of these powers, without looking to the instruments to which I refer; it follows that, in my judgment, they were properly admitted in evidence at the trial. Then come the words of the clause in question, viz. "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." A more general power can never be expressed: It is not clogged with any qualifi-

qualification: It requires only a clause of re-entry "for non-payment of the rent;" not *on* non-payment of the rent. There is no allusion to an immediate entry *for* or *on* non-payment of the rent, but a clause of re-entry generally for non-payment of the rent.

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Now, my Lords, in this last case, which is the case before your Lordships, the lessee pays the fine contracted for to the tenant for life, the lessor, at once— in the very commencement of the term. The tenant for life receives at that time the whole value of the lease and of the premises demised, except the nominal rent of 2*l.* *per annum*, and the small duties; and it can hardly be supposed it could be the intention of the parties to the settlement, in a case where the lessee paid all the value at the first instant, that he should be in a worse condition than the lessee under the other power, paying rack-rent, who was not to pay any rent until he had enjoyed the possession of the premises; and to whom an extension of 28 days, beyond the time fixed for payment of his rent, was given.

Now, my Lords, Lord *Vernon* intending to execute this power, executed the lease in question, containing a power of re-entry for non-payment of rent, with this proviso, "that if it shall happen at any time during the said estate hereby granted, that the said yearly rent or sum of 2*l.* and every or any of the duties, services, reservations, and payments hereby reserved, or any part thereof shall be behind, unpaid, or undone, in part, or in all, by the space of 15 days next over or after any or either of the days or times, whereat or whereupon the same ought to be paid, done, or performed, as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof, if any be, may be fully raised, levied, and paid,"—it shall and may be lawful to and for Lord *Vernon*, or the person to whom the free-

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hold or inheritance shall belong, to re-enter; and the question before your Lordships is, whether this proviso is agreeable to the power, which directs, that, in the lease, there should be a power of re-entry for non-payment of rent?

There are two objections stated; the first is, that, in the lease, the time for the payment of the rent is extended to 15 days, whereas it is insisted, that the re-entry ought to have been immediate, and at the time when the rent was reserved to be payable. The second objection is, that the re-entry is given in reference to a want of a sufficient distress.

My Lords, it is clearly established, that the construction of powers is to be governed by the intention of the parties who make them, that intention to be ascertained by a fair interpretation of the language in which the power is worded; in this case, Lord and Lady *Vernon*, uniting in marriage, may be considered, under their settlement, as owners of the estates; though, before marriage, it was her Ladyship's property. By this settlement, they propose to grant leases to all who choose to take them upon the terms mentioned in the powers; one of which, relating to the property under consideration, is, that the lease should contain a condition of re-entry for non-payment of rent. My Lords, it has been considered and has been ruled in many cases, that, in the construction of powers, the courts ought to be as liberal as may be; and more liberal in favour of a lessee where the power is executed by the person, out of whose inheritance the estate issues, than when executed by a third person, a stranger. It has been contended, that, in this case, the estate moving originally from Lady *Vernon*, Lord *Vernon* was to be considered as a stranger, and, that there ought, therefore, to be a greater strictness applied with regard to the lessee, than if he was originally the owner of the estate; but I beg of your

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Lordships to observe, that, in this case, Lord and Lady *Vernon* had, each of them, when in possession, the same power to grant leases; the words of the power are precisely the same as applied to each of them, and must be construed as much to apply to a lease made by Lady *Vernon*, as to this lease made by Lord *Vernon*; and, therefore, they must be construed with the same attention to the meaning, as if the words were applied to a lease by one or the other, and we are bound to consider, in construction, the lease in question, as if made by Lady *Vernon*, from whom the estate originally moved, and who may fairly be considered as in a situation similar to the case which I am about to mention, and, upon which, some of your Lordships can have no doubt. Suppose a landlord, seised in fee simple, enters into an agreement in writing with a man to grant him a lease for a number of years, with a right of re-entry for non-payment of rent at the time specified. Suppose a bill filed in a court of equity by one or the other of the parties for a specific performance of the agreement. The court would refer it to a master to settle the terms of the lease; and any gentleman, who has ever sat in a court of equity, must admit, that the court will, if applied to, direct the insertion of a power of re-entry upon reasonable and usual terms; and, unquestionably, extend the time of re-entry to a reasonable time beyond the time fixed for payment of the rent; referring at the same time to a sufficiency or deficiency of distress, as in the present lease. I mention this case of an agreement, because it seems to me to apply very closely to the case before your Lordships. Courts of equity adopt the same principle and practice in hundreds of instances, such as leases by guardians of infants, committees of lunatics, and the like. The court so acts, because it executes the intention of the parties: and a court of law, in construing powers, is equally bound to adopt the

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intention of the parties creating the power; and there is no difference in the construction of words in a power, and of words in any other instrument. My Lords, suppose Lord *Vernon* had agreed to grant a lease pursuant to his power, and had not granted it; and there was a bill in equity filed to compel him, or by him, to compel the person who had agreed, to execute the lease according to the power; the court would, I doubt not, direct a lease to be executed with a power of re-entry upon the usual and reasonable terms, which would be according to its construction, according to the intentions of the parties creating the power; and, I presume, the lease to be executed under the orders of the court would be similar to that which has been executed in this case. I am more willing to refer to the proceedings of a court of equity, because I am speaking in the presence of those, who have, perhaps, more knowledge and experience, than any persons of the present or any former times.

My Lords, I understand from extensive information, and my own experience, such as it is, justifies me in believing, that the practice of all conveyancers has been consistent with what I have stated now, so far as the extension of the time is concerned; and, if it be so, it certainly must be considered as founded upon the intention which is ascribed to the party making the power; for, it is obvious, that, if the power, as it is contended, required a right of re-entry at the moment the rent was due, the enlargement of the time would be, in some degree, unjust to the reversioner, as it would cause a postponement of the day of payment: but the practice has been, I believe, so general, that it must be strong evidence of the intention ascribed; and so inveterate, that it would be very highly dangerous to affect it: and I have always understood that the Judges have always considered an universal or very general practice amongst

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conveyancers a sufficient ground for their decisions, though they did not entirely approve of the principles on which the practice had proceeded.

On this point, *viz.* the extension of the time, I have been always inclined to support the lease, and I am of opinion that the objection ought not to prevail.

With respect to the other objection to the lease, viz. that a re-entry cannot be had unless no sufficient distress can be had upon the premises, I do not find, from the best inquiry that I have made, that any very general practice or understanding upon the subject, namely, with respect to the execution of powers, has prevailed amongst the conveyancers, and I have not been able to find that any decision has yet taken place, by which I am, in a judicial point of view, bound to abide. I must confess, that I was, for some time, convinced by the reasoning so strongly pressed by some of my learned Brothers, and that I formed an opinion on this part of the case agreeable to theirs, from whom I am now under the necessity of dissenting; but your Lordships' commands have obliged me to re-consider the case, and I feel great consolation in having had the opportunity, as I hope that I have been able to take a more correct view of the subject.

The objection to the part of the lease, with which I am now troubling your Lordships, is certainly greatly supported by the inconveniences imposed on the reversioner; but, if I am right in deeming the lease good, notwithstanding the extension of the time for the payment of the rent, it must be because it is agreeable to the true intent and meaning of the power, though there are no words that expressly allow that extension. If so, it may be right to presume, that the words used in the power meant more than is expressed, and that any right of re-entry on reasonable and usual terms, so far as the extension of the time is concerned, is good. If

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so, what prevents us from enquiring whether the other terms are reasonable and usual, I mean with respect to the distress; and from holding, that, if they are usual and reasonable, they are within the power? It cannot, I think, be said, that the circumstance of the want of a sufficient distress can be considered as imposing any condition either not reasonable or not usual. Every one's experience shows, that in leases in general, it is not only usual, but most general, and it cannot be supposed to be otherwise than reasonable; and the leases produced in evidence, which, I think, were properly received, prove the existence of this clause in all of them, as applied to the power.

It is observable, however, my Lords, that the power now under consideration is the first in the settlement: it requires, in very general terms, that, in every lease pursuant to it, there should be a power of re-entry for non-payment of rent, or because the rent is not paid; it does not specify any qualification or condition, and only requires that clause of re-entry without more, excepting for non-performance of the covenants. Now, my Lords, it is clear that the clause does contain a power of re-entry for the non-payment of rent, than which nothing in the world can be more general and unrestricted; and under words so general, I humbly conceive, that there is in the lease a clause of re-entry on reasonable and usual terms. In a condition of re-entry, all that the law requires is to secure the payment of the rent, and re-entry is, as it were, penal; and, therefore, the clause in this lease, under the general words of the power, is nothing more than what the law would enforce and require; and therefore the clause is exactly agreeable to the power, as it is reasonable and usual.

That the real object of the power of re-entry is to secure the payment of rent, is quite obvious; for a court of equity, acting on reasonable grounds, has always prevented

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prevented a re-entry from taking place, if the rent is paid, though the time of re-entry has arrived; because it was considered merely as a security for the payment of the rent. The maker of it cannot be supposed, in directing the clause of re-entry, to have intended really to destroy the interest given to the lessee, but to secure the repayment of the rent reserved to the reversioner: and now, by the 2d *Geo.* 2., the legislature has given a sanction to the clause which is used here, and directed the effect of it in general. Surely it is very difficult to imagine it is not a reasonable clause, since the legislature has authorised it in an act of Parliament, made expressly for the purpose of assisting landlords, and I apprehend that the clause must be considered as agreeable to a power which requires only a clause of re-entry for non-payment of rents.

I beg here to request your Lordships' attention to the the observations which I have made on the proceedings of courts of equity, which apply to this head as well as to the former; for, I conceive that those courts would direct a clause similar to that which is now in question.

Now, my Lords, suppose this was a lease by Lady *Vernon*, it seems to me, that, according to the argument itself used at the bar, there would be very great difficulty in maintaining that the lease was not according to the power, as the estate moved from her ladyship, and therefore the construction of the power, would be more favourable to the lessee; and if the words were the same, in the lease she might have made, as they are in this lease which Lord *Vernon* has made, the lease would, I think, be considered as valid; and there can be no different construction of the same words; for the construction, in both cases, must be on the intention ascribed to the parties who used them in the settlement.

My Lords, the lessees are purchasers for valuable consideration under the settlement, and, upon the faith

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of the power in the settlement, they have paid the value of the estate for the term demised to them, except the small rent and duties. I am persuaded that every court must feel very desirous of supporting the lease executed. The clause objected to is reasonable, and perfectly calculated to secure the rent. It is inserted in all general leases — it is sanctioned by Parliament — it is, as I conceive, agreeable to the proceedings in courts of equity, which act on the intention of parties, collected from the instruments executed by them; it is consistent with all the other leases in the family, made under similar powers.

Under these circumstances, I confess, it appears to me, on the best consideration I have been able to give the case, that this lease is warranted by the words of the power in the settlement, and that the lease is valid.

Dallas C. J.

DALLAS C. J. In answer to the question which your Lordships have been pleased to propose to the learned Judges, I am of opinion, that the lease in question is bad as not being a good execution of the power.

Two objections arise. The first, as to the fifteen days: the second, to the clause providing as to distress: and the case has been argued at the bar, and considered by the learned Judges on the double ground of authority and principle; to each of which I shall separately advert.

And, first, as to the fifteen days. The single case cited is of a negative nature; that is, one in which, though other objections were taken, this was not. And on this case, I think, a great deal too much stress has been put; for, without saying, at present, whether the objection be well or ill founded, good or bad, intrinsically considered, I will only observe, that, when it is seen how it weighs with many learned persons, now, that it *is* taken, it seems

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to me it is going a great way, indeed, to assume, that, if it *had been* taken formerly, it could not have succeeded; and, much too far to infer, that, its not having been taken is to be considered as proof, that, by common consent, it was treated as not fit to take. The more natural and rational supposition I should apprehend to be, that it was not adverted to at the time: at least, this is the opinion I should form; for I know not on what legitimate ground of reasoning we can assume, that what appears to be so important *now*, was considered and rejected as unfounded *then*. Still, however, let this case weigh as much as it fairly ought, it is admitted to be but negative authority; and the question now occurring and requiring positive decision, it must be examined and determined on authority, if there be authority; and, if there be no authority, then on principle. Such, then, is the only case relied upon, with respect to the objection applying to the fifteen days.

I come next to the provision as to there being no sufficient distress. And here again, in support of the validity of the lease, one case only has been cited, *viz.* *Hotley* v. *Scot*, as bearing directly on the point. On this, I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary; and, therefore, as to the imperfection of the report, the character of the reporter as such, the insufficiency and invalidity of the reasoning as reported, and the other grounds of objection made by some of the learned judges, with whom I agree in opinion, to these I shall merely refer, repeating only, for myself, what I said upon a former occasion, and am not disposed on reflection to retract, namely, that, though the particular point now under consideration was not adverted to, then, in the decision reported as it is, still, as it must have been different, if the objection then and now made had been deemed valid, I think, that, in fairness, I must take it, such

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such as it is, to be a case adverse to the opinion I entertain. Taking it then as such, and trying it as authority, the only ground to which at present I am addressing my observations, the first objection to it is, that it is a single case, not professing to be grounded on any that had preceded, nor appearing to have been supported by any that had followed it; but, on the contrary, the only similar case, *Coxe* v. *Day* standing in opposition to it; for, as such I consider it, and, for reasons which I shall presently give. I need scarcely add, that such a case, dissented from as it now is by so many of the learned judges, admitted to be inconsistent with the decision in *Coxe* v. *Day*, and, at all events, confessedly at variance with the observations and reasoning of Lord *Ellenborough*, throughout the whole of that case, can scarcely, as mere authority, be considered of much avail. In opposition to it, I have said, appears to me to be the case of *Coxe* v. *Day*. But here, again, I wish to deal correctly with the subject of authority; and though to a certain degree, (and to what degree I shall examine) *Coxe* v. *Day* must be permitted to operate, still, I think, it is not to be relied on, strictly, as mere authority, even in favour of my view of the subject: first, because if *Hotley* v. *Scot* was rightly decided, *Coxe* v. *Day* would be in opposition to it, and thus we should only have case against case; and further, that, with respect to *Coxe* v. *Day*, of the learned judges who now support the judgment of the King's Bench, it is disapproved of by one, as to the grounds on which it stands, and expressly, and in terms dissented from by the other; and, lastly, because being a decision by the same court by which this case was, in the first instance, decided, if to be distinguished, as it is contended it is to be, then it does not apply; if not to be distinguished, nothing of authority can result from two cases decided by the same court in opposition to each other.

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To dispose, therefore, of the whole subject of authority, it appears to me, that, though these cases as cited, have afforded much matter for observation and argument, they furnish nothing like authority, when correctly considered, and in a judicial sense. A word or two, only, before quitting this part of the subject, on what has been much relied on as applied to the objection of the 15 days, namely, the general prevalence of such leases to be taken as evincing, it is said, the sense of the profession, and the mischief that will result from now holding the objection good. I allow to these topics their weight, and much weight undoubtedly belongs to them; but if, when strictly examined, the practice proves to have crept in against principle, and is not pretended to depend upon any positive authority, I can only say, that, being bound to look at the objection, now that it is made, I must decide upon principle; and if principle and practice are at variance, practice must give way; and, in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere. This, however, at most confines itself to the objection as to the 15 days; for, with respect to the clause of distress, it is not pretended to have any usage or practice in its favour; and the only decided case is directly the other way. And, with respect to practice, the extension as to the 15 days operating, I admit, in proportion to length of time, and number of leases, becomes, for this very reason, and, in the same proportion, stronger against the clause as to distress, inasmuch as in all such leases, no such clause is to be found; and my brother *Holroyd*, to whose labour of research and solidity of learning we are all of us, at all times, so much indebted, has informed your Lordships, that, on an accurate research, he has not been able to find, in the books of precedents, beyond one instance of such a lease, and that not appearing to be

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be adopted in common use. Practice is, therefore, not only wanting in its favour, but practice is the other way; and in this respect, practice and decision go hand in hand.

I come now to consider the case on principle. And, first, I admit, that, if the power is to be deemed indefinite as to time, and, therefore, to be exercised in a a reasonable manner, leaving it to the discretion of the party by whom it is to be executed, to decide what is reasonable, it does not appear to me, that the giving 15 days, in the way in which they are given, can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether 20*s.* are to be paid by the one, and received by the other, 15 days sooner or later; and so, I apprehend, the party might have thought, had his attention been drawn to the point. But, when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself, pre-existent, and having caused the power to be framed precisely as it is, I can only say I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained a precise intention of any sort on the occasion. The substantial purposes were to be accomplished; the detail of execution was, of course, left to others; and this may account for the difficulty that has arisen. Drawn as the power is, it was probably supposed by professional persons, that the former leases might be looked at, and the clause in question, being found there, was adopted, and I agree, reasonably adopted, if such leases were to govern or might govern; but whether so, or not, is one of the questions in this cause, and which, if decided in the affirmative, would support the lease, as far as this objection goes, though, decided the other way, the case will still depend on the other general grounds,

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grounds, and the lease may, notwithstanding, be valid. Fifteen days, therefore, if time might be given, I should consider as not unreasonably given.

In like manner, as to the clause of distress, I see no actual injury as likely to result from it, in this particular case. I agree with several of the learned judges, that it is not likely that 20*s*. of half-yearly rent would be suffered, if demanded, to remain in arrear; or, if in arrear, that, in the case of leases upon fines, a distress to the value of 20*s*. would not be found. But this is a way of trying the question, precluded by the very nature of the question itself. The providing for a particular event, not only pre-supposes the possibility, but even the actual occurrence of such event. It pre-supposes to provide for it. It anticipates and adapts itself to it.

The question, therefore, arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency, the weight and value, which we are not at liberty to consider; and, therefore, without looking out of the instrument, but to the instrument, and searching in it for the intent to be collected from what is there expressed, if sufficiently expressed; in other words, treating the question as your Lordships desire us to treat it, that is, as a question of construction arising on the instrument, such as it is, — what is the legal effect of the lease compared with the power?

And, first, to look to the power, agreeing, as I do, that the intention of the party must govern, as to be collected from the whole instrument. It directs a clause of re-entry for non-payment of rent; and this merely; nothing is said as to time, nothing as to distress; nothing as to reasonable, nothing as to usual; nothing that refers to any former lease or leases in any way whatever, so as to furnish a rule; though reasonable and usual, ancient and accustomed, are terms to be found

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found as words of reference in several parts of the instrument, directly connecting themselves with former leases and for various objects and purposes.

First, then, as to time. That time may be as properly fixed by the occurrence of an event, as by the express specification of time, can scarcely be denied; and when rent is made payable on a particular day, connected with a clause of re-entry for rent not paid, I can only understand not paid on the day when payable. In this there is nothing ambiguous, nothing deficient, nothing to be implied to complete what is expressed. Nor has it been argued, that, if the lease had been drawn in the very terms of the power, it would not have been a proper execution of the power. But, it is said, in the same instrument, 28 days are given for payment on the leases at rack-rent, being a substantial and heavy rent, before forfeiture can attach for non-payment; and it is argued, — could the party intend a provision so preposterous and harsh, as that forfeiture should become the immediate consequence of a half-yearly rent of 20*s.* falling into arrear? To which, I answer, that this suggestion of harshness appears to me to be imagination, and nothing more; for what of real harshness is there in making an estate liable to forfeiture upon non-payment of a sum so small, as, from its very smallness, not to require time to be given to pay it? Fifteen days were scarcely necessary to put a party into condition to pay 20*s.*! And further, why the party to receive could not judge if time were to be given as to the 15 days, as well as to the twenty-eight, I am altogether at a loss to conceive. If at liberty, therefore, to conjecture as to intent, independent of the words made use of, my conjecture would be, that the party himself meant nothing as to the 15 days, beyond what he has said; that he meant only what he has said; and still less, if possible. Can I suppose, that he actually meant

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meant time to be given, intentionally avoiding to decide what that time should be; and this, merely to leave it open to the discretion of another to decide for him, what he could just as well have decided for himself? In the particular case, time may be of no moment any way; but, as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance. It is not in the operation of the clause, as it applies to the lease, treated as a valid lease, that any difficulty arises, but in the application of the lease to the power, with a view to the validity of the lease.

But I go further, and will suppose the question to be, whether the power should not be so construed as to imply a reasonable discretion to have been intended as to time. In such event, it has been asked, who is to construe, what would be reasonable time? Now passing by all the difficulties that may arise in this respect, I am willing to answer — the competent tribunal according to the nature of the case. But which, according to the case, is the competent tribunal? This becomes a question. On the trial of this ejectment, was it the jury or the judge? and though, in the result, which of the two might be ascertained, yet the result could only be got at through, as now, a doubtful controversy; and this uncertainty as to tribunal, with the additional uncertainty as to result, that result depending on the uncertainty of opinion, which may be different with different men, and of which these proceedings have, in every stage, afforded ample proof, and, this day in particular, a striking instance, are all inconveniences introduced by holding the power to be indefinite, and would have been avoided by framing the lease in the words of the power. One way, it would be certain; the other opens, at least, to question; and it is this substitution of uncertainty for certainty, this rule of discretion, which throws open the

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gate to litigation, that would otherwise be closed and fastened against it, that constitutes my fundamental objection, so to understand and so to construe this power. If, therefore, the question be, whether reasonable or not should be implied, I should hold, that it ought not to be implied, even if we were at liberty to imply it, framed as the power is.

I come, now, to the second objection; and though, in one light, it is the most material, yet it will not be necessary in this late stage of the proceedings to discuss it at any length; I mean, restraining the right to re-enter to there being no sufficient distress to be found on the premises. And, with respect to this, all I have hitherto said as to time applies with increase of force. It is a further clog, not warranted by the orginal power; and it is one which, as to possible injury, does not rest in speculation merely. The case so often referred to in the Exchequer forms a practical comment. When resorted to as a remedy, it shews the wrong which may result. The lessor of the plaintiff failed, because some obscure corner of the premises had not been searched. That case is this; and, in a similar proceeding, the effect would have been or would be the same. To the validity of this objection, *Coxe* v. *Day* is in point. It is so, I conceive, in the decision; it is so beyond all doubt, as I apprehend, from what is said by Lord *Ellenborough* throughout the whole case. Whether to be fairly distinguished or not, in any respect, I have already examined, and will not repeat. The argument drawn from the statute, and the general nature of such a clause considered as a mere security for rent, was brought forward then, as now; but was mentioned only to be over-ruled; the point not appearing to the Court to be sufficiently tenable to admit of discussion.

To one or two other points, I shall now barely advert. I can scarcely think that the question can be reduced to one

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one of mere verbal consideration. But, if so, I cannot myself feel the difference between "on" and "for;" "*for* non-payment of rent," I consider to be equivalent to "*on* non-payment of rent;" though I have no hesitation in admitting, that "on" and "for" may be sometimes different, and sometimes synonymous, and this depending on the context and the subject matter. But looking at the subject-matter, and, taking the whole of this instrument into consideration, I think there is no reason for distinguishing on the present occasion. In like manner, as to the term "beneficial," I conceive it to refer to the lessor or the remainder-man, and not to the lessee; and, so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause, unclogged with any conditions as to time or distress. Taking, further, the words of the power to apply to former reservations, and that, with this view, former leases might be looked at, it seems to me, the argument turns the other way. The power directs, that there be reserved the ancient and accustomed rents, or as great or beneficial rents, duties, and services, thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed; and so, as to duties and services; but following up these general words with special and particular words, shewing the powers were not intended to include the clause as to re-entry, particular words specially providing for this right, and in terms directing how it shall be reserved: and, having mentioned former leases as admissible in these respects, I will only further say, I think they were not admissible, except for the purposes as to which they expressly, or by necessary implication, refer. This is, indeed, a necessary consequence of all I have already said; and without, therefore, going at large into the wide field which the argument in this respect has occu-

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pied, but referring generally to the opinions and reasoning of those who think as I do, I will merely state the broad ground of my opinion, which is, that there being no ambiguity of any kind, nor any words of reference to any other as former leases as connected with this subject, nor any generality of expression, so as to let in extrinsic evidence to restrain or qualify, or to exclude, but a clear, specific, and definite sense and meaning, such evidence is not admissible. This conclusion, it will be admitted, must follow, if the premises are well founded, but whether so or not depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your Lordships to judge.

Abbott C. J.

ABBOTT C. J. I am of opinion, that the demise of the 5th *September*, 1803, is not invalid.

The objection, upon which it is now sought to avoid the lease, is, that the clause of re-entry for non-payment of the rent is not such as is required by the settlement: and this for two reasons. First, because it allows to the tenant fifteen days for payment beyond the days mentioned in the lease; and, secondly, because it is restricted to instances, wherein no sufficient distress or distresses can or may be had or taken upon the premises whereby the same, and all arrearages thereof, if any be, may be fully raised, levied, and paid.

This objection is *strictissimi juris*, and, as such, is by no means to be favoured; though, if the *strictissimum jus* be found upon due consideration to be with the objector, a court of law is bound to yield to his objection. As I have already intimated, I think the right is not with the objector.

In the course of the argument at your Lordships' bar, your Lordships' attention was called to a supposed distinction in the construction of powers, between such as

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are created by the owner of the inheritance limiting a partial estate to himself, and to be exercised by himself as owner of such partial estate, and such as are created by the owner of the inheritance, to be exercised by a stranger, to whom he may have limited a partial estate, or to whom he may have given the power as a naked power, unconnected with any estate in the land. Such a distinction appears inapplicable to the present case; because the owner of the inheritance has, here, limited a partial estate, first, to a stranger, and, secondly, to herself; and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger, or by herself.

It was also argued, that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder-man; and, therefore, that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point, also, appears to have little weight in the present case; because, adverting to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think, it cannot be supposed, that the purchaser of the present lease would have given one farthing less, if the clause of re-entry had been strictly confined to non-payment of the rent at the very day; or, that the estate of the remainder-man would now be worth one farthing more, if the lease in question had contained a clause to that effect, instead of the clause upon which these objections have arisen.

And, being of opinion, that the tenant for life could derive no benefit, and that the remainder-man sustains no prejudice as to the value of his interest, from the form in which the clause of re-entry is found in this lease, I think, a court of law may reasonably regard the interest of the tenant, *the purchaser of the lease*, and

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put such a reasonable and liberal construction upon the words of the power in the settlement as will give effect to the lease, rather than yield to critical forms and subtil objections adduced for the purpose of defeating it. And this becomes the more important, if it be true, as has been suggested, that very many leases are in existence containing clauses similar to the present, and demised from powers expressed in language similar to that of the power from which this lease was derived. Considerations of this nature, certainly, ought not to control or vary the sense of plain and unambiguous words; but they may be reasonably entertained for the construction of words of doubtful import; not merely by reason of the consequences of a decision in a particular case affecting numerous other cases of the like nature; but because the fact suggested is evidence of the general opinion entertained by professional men upon the meaning of the words of a legal instrument.

These words, in the present case, are "a power of re-entry for non-payment of the rent to be thereby reserved." And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a power which the landlord may exercise, if the rent be not paid at the very day, and without regard to any property to be found on the demised premises, upon which he may levy his rent, and, thereby, compensate himself, at his tenant's expence, for his tenant's neglect.

If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry contained in this lease be a reasonable power. I shall proceed, in the first place, to shew, that, in my opinion, the words in question may be understood to mean a reasonable power. Non-payment is a mere neglect or default, and, if the words, "a power of re-entry for non-payment of the rent," are to be taken strictly and *ad literam*, they will import a power

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of re-entry for the mere neglect or default of the tenant: but this cannot possibly be their legal import or effect, because, by the common law of *England*, a landlord never could enter for the mere neglect or default of his tenant in this respect, under any power or clause in whatsoever language expressed. Some act is always required to be done by the landlord, in order to entitle himself to exercise his power, and this is required to prevent the tenant from being surprized or injured. This act, at the common law, was an actual demand of the rent on the part of the landlord. And the common law required this demand to be in a most precise and peculiar manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole day to prepare his money) at the time when so much day light remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage, if any on the premises, and, if none, then at such usual and notorious place of resort where the tenant might reasonably be expected to be found, if he was not altogether absent; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due and recoverable by distress or action, were considered as waived by the landlord on a question of forfeiture by his prior neglect to demand or enter for them.

Then, if the words of the power, or, rather, of the qualification of the power, contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default, only according to their literal purport, they must receive some other and different construction, which must, in my opinion, be a reasonable construction, and a construction properly suited to the object and purpose in view; that is, to secure and enforce the payment of the rent, so that, on

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the one hand, the tenant may not hold the land without payment, to the prejudice of the landlord, nor, on the other hand, be dispossessed of it, if either himself or the land, which is emphatically said to be debtor for rent, presents payment or the means of payment without unreasonable delay or prejudice to the landlord.

It has been objected, however, that, if the literal or strict meaning of the words be not adopted, no other meaning can be, because, as it was said, courts of law cannot say what is a reasonable power or clause of re-entry. But, I conceive, that in this, as in all other cases, courts of law can find out what is reasonable, and that, in some cases, they are absolutely required to do so. In many cases of a general nature, or prevailing usage, the judges may be able to decide the point of themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite, and, wherever such assistance is requisite, there are ready modes of obtaining it. I will mention one instance, in which courts of law are required by the legislature to discover and decide, if the point be legislated, a question upon the reasonable execution of a power. By the general inclosure act (*a*), a rector or vicar is enabled to lease his allotment under certain restrictions mentioned in the act, and, among others, so that there be inserted in the lease, "power of re-entry on non-payment of the rent or rents to be thereby reserved within a reasonable time to be therein limited after the same shall become due." A lease of such an allotment must, therefore, provide, that if the rent be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter; and, if any question should arise, whether the number of days specified in a particular lease, be or

(*a*) 41 *Geo.* 3. *c.* 109. *s.* 38.

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be not a reasonable time, the courts of law must necessarily find some mode of deciding the question.

For these reasons, my Lords, I am of opinion, that the words of the clause in question may, and ought to be understood to mean a reasonable power of re-entry. And, taking this to be the legitimate meaning of the words, I proceed to shew, that, in my opinion, the power of re-entry, contained in the particular instance of the lease in question, is a reasonable power. Usage is of great weight in considering what is reasonable; and it cannot be denied, that the power of re-entry, as expressed in this lease, is, in form and substance, such as was frequently found in leases before the execution of the settlement by *Louisa Barbara Mansel*, which was in 1757. This is a fact which must be in the knowledge of some of your Lordships, without recurring to the special verdict for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of 15 days, which is the period allowed in the present lease, will not, I am persuaded, be thought an unreasonable space of time. Indeed, although this objection was pointed out, it was not so much insisted upon at your Lordships' bar, nor could be in the construction of a settlement allowing 28 days for payment in leases to be made at a rack-rent. The main stress of the argument was applied to that part of the clause in the lease, which narrows the power of re-entry to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearages thereof, may be fully raised, levied, and paid.

Upon this part of the argument, the case of *Coxe* v. *Day* (*a*) was quoted and relied upon. It has, however, been

(*a*) 13 *East*, 118.

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been discovered, that the decision in that case is contrary to a prior decision of the Court of King's Bench in a case of *Hotley* v. *Scot*, reported in *Lofft*, and of which a more correct manuscript note was also cited. This earlier case was unknown to the counsel by whom *Coxe* v. *Day* was argued, and probably to the Court also; so that the decision of *Coxe* v. *Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving Judges of the Court, when the present case was before them; and it is distinguishable from this by the difference of the language of the clause upon which it arose. For, in that case, the words of the clause were not general, as in the present, "a power of re-entry for non-payment of the rent," but special, "a power of re-entry, if the rent be behind for the space of 21 days," which words do not so easily admit the introduction of any other qualification or matter as the general words of the present clause: so that, upon the whole, the case of *Coxe* v. *Day* does not appear to contain a decision precisely in point to the present case. And, therefore, in respect of authority, the question still appears to be left open, — whether, in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right, or power of re-entry to the absence of a sufficient distress be a reasonable restriction in a lease like the present; for, if it be, then a right or power so restrained is a reasonable right or power of re-entry, and the introduction of such a right or power into the present lease, is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or frequent,

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frequent, before passing the statute 4 *Geo.* 2. (*a*), in 1731. If the effect of that statute be (as at least one very learned person has thought) to alter entirely the common law, and to take away the right of re-entry under any circumstances of demand and refusal of the rent, where a sufficient distress can be found, then, certainly, the express introduction of the words of restriction cannot invalidate the lease, because it is only an expression of a matter tacitly contained and implied by operation of law. But, supposing the statute not to have this effect, still, in my opinion, the restriction is reasonable in itself in a case like the present. The instances of proceeding at the common law by demand of the rent since the statute was passed are very few; the proceeding is in itself troublesome and difficult, as will appear by the circumstances required, which I have already mentioned: it was, indeed, so troublesome and difficult, and found to be attended with so little benefit to landlords, that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it, then, be said that the reversioner is unreasonably restrained or prejudiced by the introduction of a matter which the legislature has thought generally beneficial to landlords, and which, in all probability, he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise? I say, that, in all probability, he would have adopted it, because, I presume, his only wish, like that of every other reasonable person, must be to obtain the payment of his rent in the most easy and speedy manner. And whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent bearing, as in this case, a very small proportion to the annual value of the tenement, still I have the authority of the legis-

(*a*) c. 28. s. 2.

lature,

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lature, and of the experience upon which the statute is founded, for saying, that this difficulty is less in practice than the difficulty of making such a demand as would authorize a re-entry at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say, that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow. The power of re-entry, in whatever words it be expressed, can be exercised only in one of two modes; that is, either by making a demand at the common law, without regarding the value of distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found on the premises, without regarding a demand of payment. For the reasons already given, I think the latter must be considered as the most effectual and beneficial mode; and, therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case,) that the tenant, being taken by surprize, and not expecting a demand, may not be prepared for immediate payment in money, and a desire to take advantage of his want of preparation, and deprive him of the residue of his term, or harass him with a law-suit. To such a motive a court of law will never lend its aid. And a construction calculated to give effect to such a motive would be contrary to the general principles of the law. And it ought not to be omitted, that the present question arises upon the construction of that part of a leasing power which is intended to create a forfeiture of the lease executed under the power. It is said in our books, that forfeitures are odious in the law, and this is the reason assigned for requiring so much formality and precision in the demand of the rent at the common law. And,

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for the same reason, in addition to all others with which I have troubled your Lordships, I think such a construction ought to be put upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeitures of the leases to be granted under it.

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For these reasons, I am of opinion, that the demise of the 5th *September*, 1803, is not invalid.

The *Lord Chancellor.*

The LORD CHANCELLOR (*a*). My Lords, the question which is now brought before your Lordships for decision, is undoubtedly a question of very great importance to the parties. We have to determine, as I understand, upon the validity of a particular lease, which is stated in the special verdict. The decision upon that lease, however, will not only give validity or invalidity to the lease in question, but, as we have been informed by the bar, to the leases of a very considerable mass of property. The Plaintiff, therefore, has a great interest in your Lordships' decision; the tenants, of course, have a very considerable interest in your Lordships' decision; but the interest in your decision is not confined to the landlord and the tenants, because, I apprehend, that, if these leases are invalid, the tenants in this case, probably, as in a case from another part of the united kingdom (I mean the case of the *Queensberry leases*) will have a title to recover against the assets of the deceased lessor, the value of their interests in the estate. But, however great the interest of any of these parties may be, it is most for the public interest that your Lordships should take care to decide rightly.

My Lords, if I could hope, that, by asking your Lordships for further time, I could alter that opinion which, it is my duty to inform your Lordships, I have

(*a*) *Lord Eldon.*

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long entertained upon the question now before you, (and the rather my duty, because, if it should appear to you to be hastily formed, it will deserve the less attention,) or if I could, consistently with my other important engagements and duties, hope to find time, in which I could lay down the humble statements I am now about to make with more method, or if I could hope to relieve myself from the pain which I do most sincerely feel, in maintaining an opinion upon this subject, different from that which has been expressed by many persons, for whose learning and abilities I entertain the greatest respect; I should endeavour to press your Lordships to delay hearing what I have humbly to offer to your Lordships' attention.

My Lords, I must confess, that the habits of my professional life led me at first to entertain a very considerable surprize indeed, how, upon some of the questions agitated in this house, there could be any difference of opinion any where. My Lords, with respect to the authorities, your Lordships have heard observations which are perhaps much more apt than I could presume to offer to your attention, upon the conflicting cases of *Hotley* v. *Scot*, and *Coxe* v. *Day*, and the negative authority of the case before Lord Chief Justice *Willes*, who, I believe, was a very great lawyer. Those authorities I shall not, I hope, be thought to treat with any disrespect, which certainly I do not mean, when I avail myself of what has fallen from the two learned Chief Justices in their observations on *Coxe* v. *Day*. If *Coxe* v. *Day* is an authority one way, *Hotley* v. *Scot* is an authority the other way; and the judgment of two of the Judges in the court below on this very case, conflicts with the case of *Coxe* v. *Day*. But, my Lords, such have been the habits of my professional life, that I cannot possibly think that we have considered all the authority to be taken into consideration upon this subject.

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ject. My Lords, we hear of the practice of conveyancers, and that amounts to a very considerable authority; and I am justified in that assertion by the opinions of the greatest men who have sat in *Westminster Hall*, who I am persuaded, in many instances, if matters had been *res integræ*, would have pronounced decisions very different from those which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority; but, upon this subject, my Lords, I do not think that the unwritten authorities are fairly considered, when it is merely put, that such clearly is the practice of conveyancers; and I would take the liberty with very great respect (with respect too, more sincere than I really know how to express) to intimate an opinion that, upon cases of this nature, it might not be much amiss, if courts of *law* would enquire a little more what has been done as well as said in courts of *equity*: not for the purpose of determining differently what are the points, but of determining how far men, who have sat in the courts of equity, have determined the legal point before they have applied themselves to those directions, and decrees, and orders, which they are daily in the habit of pronouncing. My Lords, between the year 1772, (it is a long while to look back to,) and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer; and I was led, at that time, to a knowledge, not only of the practice there, but of what were the sentiments of the great conveyancers of those days; and I am as sure, I think, as I can be of my existence, that it never would have occurred to any one of them, if there was a leasing power in any marriage settlement, requiring such a power as this, that to give the time of fifteen or twenty days would be an invalid execution of the power. I am sure all practice was the other way; and practice, my Lords, in this respect is evidence of what is reasonable. But

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But the unwritten authority does not rest here. The power of leasing is often one which must be executed by trustees under marriage settlements. In those settlements in which they take the legal fee, it of course falls on them; and in those in which the legal estate is in the persons beneficially interested, the power of leasing is often given to the trustees to preserve contingent remainders during the minorities of the *cestuique* uses. In a great majority of cases, I can say, on my own knowledge, that the power does not mention any period of arrear before the re-entry is to be allowed. The trustees sometimes use their own discretion in executing the power to lease; at other times they act under the direction of the Court of Chancery. In the first case, their uniform practice would form a weighty consideration here. In the second, where they act by the authority of the Court of Chancery, you must permit me, for my predecessors and successors, though not for myself, to say, in every one of those leases there is an authority of law, that that is a due execution of the power: because the Chancellor has no right to direct such a lease to be made, if, when it is executed, it is not according to the power. He is a judge of law and equity, and, when he has determined as a judge of law that such is a due execution of the power, then, and then only, he has authority, according to the constitution of this country, to direct such lease to be made by the trustees. Then, my Lords, I should be very glad to know, whether the whole practice of that Court is not to be looked at as practice fixing what is the legal construction of such a power to lease?

My Lords, it does not rest here; for, suppose the case put by one learned Judge, suppose the tenant for life, here, had agreed with this occupying tenant to make him a lease with a power of re-entry on non-payment of rent, and he would not make it with a power

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of re-entry giving an extension of time, and then the tenant had filed a bill in equity to compel him to make a lease according to the agreement: — No Chancellor could possibly have directed a lease to be made with fifteen days' time, in case of a non-payment of rent, unless he was satisfied, according to law, that would be a due execution of the power; he could not have done it in any of the cases in which there has been such a decree made. I disclaim, for those who have gone before me, and those who are to come after me, the charge that such directions were not made upon the authority of cases which have, at least, as much authority, and a great deal more than those which have been stated to your Lordships.

Another authority is to be found in the construction which the general inclosure act has received. Rectors and vicars are, under the 38th section of that act, enabled to lease their allotments, so that there be inserted in such lease power of re-entry, on non-payment of rent, within a reasonable time, to be therein limited, after the same shall become due. And, my Lords, we have acted under that statute ever since it passed; rectors and vicars have been making leases ever since, and I believe you will find, that the universal practice has been to give days in the manner days are given in this lease. It is truly said, that a *reasonable* time is authorised; but, if my argument is correct, a reasonable time would have been authorised, if these words had not been introduced; and, I must add, that the words of the act answer the objection, that courts of justice cannot be required to say what is a reasonable time; for, the legislature has, in this instance, expressly required them to do so. Suppose that, in a parish in which the rector or vicar has an allotment subject to this power, there are tenants for life, receiving allotments to be enjoyed according to the limitations of the

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settlement of that land, in respect of which the allotment is made, — What is the consequence of that? The consequence of that is, that the powers of leasing in the settlements under which those respective persons (lay persons, not ecclesiastical persons) are made tenants for life, apply themselves to their whole estate after the allotment is made; and a most singular thing it would be to say, that fourteen or fifteen days is a reasonable time for a power of re-entry in a rector or vicar, but unreasonable in the tenant for life claiming under a settlement, which settlement, so far as it applies to the new allotment, is in fact made under that very act of inclosure. I say, therefore, my Lords, that your Lordships' decision in favour of the defendant in error, if not founded in peculiarities in the words of the settlement, would interfere with practice so long and so general as to make it one of the most mischievous that ever was pronounced.

I will now, therefore, consider whether any peculiarities justifying such a decision, can be found in the settlement itself; and, here, permit me to say, that I am going to comment upon this settlement, taking it for granted that it is understood on all sides, that this special verdict finds every thing that ought to be found. I put that upon the understanding of the parties. My Lords, we have had, in the course of argument at the bar, a great deal of argument on the admissibility of extrinsic evidence. Now, with reference to extrinsic evidence, my humble opinion is, that this is a case in which you must admit some extrinsic evidence; although I concede that, generally speaking, you must construe instruments by what is to be found within their four corners. That principle cannot apply here; for, when you are considering the question, whether a lease is conformable to a power in another instrument, you must look into that instrument which contains the power; and,

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and, if you must look into that instrument which contains the power, then, in order to get at the true construction of the power itself, you must look at every part of that instrument; and, if the instrument which contains the power be referred to by the instrument which is the execution of the power; and the instrument which contains the power, also refers you to other instruments for its explanation, then you must look at those instruments, and by this chain they become part of the documents on which your decision, as to the execution of the power, must be founded.

I think, in this case, you might state it thus. Here were leases made prior to 1757; the settlement refers to leases which should be existing at the time the new lease should be made, and it not only refers to the leases which should be then existing, but it refers, in that part of it which gives the power of making future leases, to the leases existing at the time of the settlement. I do not carry it so far as to say you shall go into length of time to see what were the habits of leasing prior to those then existing leases; but, I say, you must go to those then existing leases, or it is impossible to collect what the meaning of that power is. Now, my Lords, I say, also, that, if the instrument in which the power is contained, shews what was the nature of the estates which the persons had who were making that settlement, you cannot shut your eyes against that part of the settlement in which that information is contained.

With these general observations, your Lordships will give me leave to call your attention to the facts of the case. A lady named *Louisa Barbara Mansel*, afterwards *Louisa Barbara Vernon*, was tenant for life of the estates, with several remainders over, and with a power in her, in consideration of marriage, of revocation and new appointment; and the special verdict states, that, upon the 20th of *July*, 1757, she intermarried with Mr.

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Vernon; that, before the marriage upon the 2d of *July*, 1757, she, by her deed, revoked all the uses contained in the will of Lord *Mansel*, concerning the said premises, and appointed and limited the same to the Earl of *Guilford* and *Charles Montagu*, and their heirs, in trust to hold the same, after the said marriage, to the use of the said *George Venables Vernon* for life, without impeachment of waste, remainder to the said *Louisa Barbara* for life, without impeachment of waste, and after the determination of those estates, or either of them by forfeiture or otherwise, in the life-time of the said *George Venables Vernon* and *Louisa Barbara*, or the survivor of them, to the use of the said Earl of *Guilford* and *Charles Montagu*, and their heirs, to preserve contingent remainders, and to permit the said *George*, during his life, and afterwards the said *Louisa Barbara*, during her life, to take the rents, &c. and after the decease of the survivor of them, to divers other uses for the benefit of their issue; and, in default of issue, to the use of the will of the said *Louisa Barbara*, and subject to the powers and limitations to be thereby directed and appointed; and, in the mean time, to the use of the said *Louisa Barbara*, her heirs and assigns for ever; and then follows the clause upon which this question principally arises. My Lords, before I state that, I will take the liberty to mention to your Lordships another head of authority which I confess has influenced me a good deal with respect to those fifteen days. Your Lordships know, that, by a statute made some years ago, the legislature authorized the committees of lunatics, by authority of the court of chancery, where those lunatics were tenants for life with powers of leasing, to make such leases as the tenants could have made if they had been of sane mind; and I never had the least doubt, in consequence of the habits of my professional life, in directing them to make leases with this ordinary reservation of fourteen

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or fifteen days with respect to the time of forfeiting the estate. I certainly did, however, think it right, in deference to the opinion which I understood was stated in the Exchequer Chamber, to check myself in that practice, and to take care that that habit should no longer be acted on. So if a rector or vicar who had an allotment under an inclosure act had been a lunatic, it would have been necessary for the court to have acted, and I should have given a similar direction.

My Lords, then follows the clause containing the leasing power. But before I read this clause, I apprehend, that, where a power of this sort is given in a marriage settlement, it is part of the contract which all the parties in the marriage settlement are understood to enter into with respect to each other. It is their intention that is to be executed, and the tenant for life, when he makes a lease, acts according to that intention, as an instrument for the benefit of all those who have an interest in the inheritance. He must, therefore, be considered as acting with perfect *bona fides*, and, in cases of forfeiture, you are not to be astute to find out a forfeiture, if the parties really are dealing *bonâ fide*, according to what they conceive to be the intention of the framers of the settlement under which they act. If they misconceive it, that will not do; but if a fair construction will authorize you to say, they have not misconceived it, you are not to look astutely to defeat their execution. There were three species of estates of which leases were to be made under this settlement; one of them estates, as I understand, usually demised for lives, upon payment of a fine, which fine is, in truth, a great portion of the consideration paid for such leases, and the small annual rents and other services, though of some value, are of little value when compared to the fine; they are a sort of rental, which is rather from time to time calculating a small sum of

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money off the estate, than paying the value of the estate. The next species of lands are lands to be let at rack-rent for years absolute; and, with reference to them, it is very easy to reserve a power of re-entry; and the third is of mines; with regard to which, unless conveyances are more able at this time of day than some of the old ones used to be in the last century, it would be difficult to find out what sort of power of re-entry you could apply to them. Conveyancers are, therefore, in general, obliged to content themselves with alluding to proper and reasonable modes of working the mines. Then, one of the conditions to which we are particularly to attend is this, "And so as on every such respective lease, demise, or grant, for a life or lives, or for years determinable on the dropping of a life or lives, there be reserved and made payable, during the continuance of the estates and interest thereby to be demised, leased, or granted respectively, the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial yearly rents, duties, and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for or in respect of the same premises respectively; or a just proportion of such ancient or the present reserved rents, duties, and services, or more, according to the value of the premises so to be demised, leased, or granted respectively;" and then come the exceptions with respect to the heriots, and the usual clause, that these rents, duties, and services were to be for the benefit of the persons entitled from time to time. Now let us suppose ourselves sitting down to make a new lease, after the year 1757, of premises which, in the year 1757, were held under a then existing lease. Addressing ourselves to the execution of that power, is it possible to be denied, that, in order to see how the power should

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be executed, we must look at that existing lease which is the lease immediately preceding that which we are to make? I do not carry it further; I do not say that we are to go back into the more remote periods of time, and see what was the habit in all time past: but, I say, we are bound to receive the evidence to which the language of the power refers us; to receive the evidence of the deed containing the power. You must first ask, do you mean to demise according to the ancient and accustomed rent? You must go there to know what it is; and so as to the duties and services. Here are strong words here which always struck me, that it is not necessary they should be the same yearly rents, duties, and services, or more, but they may be as great *or* beneficial. I say I have a right to look at this word "*or*" as being of some signification, when I find, in other parts of the lease, as "great *and* beneficial." This is to be "as great *or* beneficial;" and I cannot help expressing, that I entertain very considerable doubt whether, if this clause *as to the distress* had not been contained in the new lease, the new lease for that reason would not have been bad. I agree with the Lord Chief Justice, that if the lease be in the slightest degree less beneficial than the requisitions of the power, it is invalid. But, if this power authorizes me to make a lease, provided the rent is as beneficial, if I demise upon the same rent in the same way, do not I reserve you as beneficial a rent as formerly?

Then, my Lords, come these words, and let us suppose that they are necessary, "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved." And this occurs in an instrument where, with respect to other property, upon which the best and most improved yearly rent was to be reserved, and where, with respect to that rent which was to be so reserved, (a rent which

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was *de anno in annum*, and from half year to half year, rendering to the landlord the value of the enjoyment), the authors of this settlement say, that there shall be non-payment allowed for twenty-eight days. I take it, now, upon the first objection as to the fifteen days; and I ask, whether a power of re-entry for non-payment of rent in fifteen days is not a power of re-entry for non-payment of rent? No man can deny that it is a power of re-entry; no man can deny that it is a power of re-entry for non-payment of rent. It is not the same power as it would be, if it were twenty days or twenty-five days; but still it is a power of re-entry for non-payment of rent: and where are the words in the settlement on which the parties insist there shall be in the lease an unconditional power of re-entry for non-payment of rent? Now, to recur again to the impression that old habits make on one's mind, it would appear to me most astonishing, — previous to the agitation of this case, it did appear one of the most astonishing things to my mind, — having a good deal to do with decisions at law, that, if there was a lease to be made with a power of re-entry, the lessor could insist it should be a lease giving a power of re-entry at the day. I should say that was contrary to the habit and usage of the Court; — speaking from that habit and usage, I say, the Court ought to decree in favour of the tenant, if he were willing to execute a lease containing a reasonable extension of time for the payment of the rent; and I cannot help thinking that, from the circumstance of pointing out the twenty-eight days in the other case, you are bound to see a difference between the case of a reservation of a rent, which is the actual value from year to year, of the land that is occupied, (as far as a tenant ever pays the actual value,) and the reservation of a rent of much less value, but compensated by a large fine: and when you consider the value of the lands and

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and the estate, as compared with the fine, it does appear to me, that this deed affords sufficient evidence, (particularly with reference to the words I have before commented on,) that, if the rent and fine are as beneficial as those in the then existing lease, it would be a due execution of the power.

But that does not touch the question about distress, I admit: unless so far as the same qualification of distress may have been in the former lease; because, if the same qualification of distress was in the former lease, then the same arguments that you build on, giving the period in the former lease, apply to giving the distress. But, if the power of re-entry required by the settlement means a reasonable power of re-entry, and if that has been the construction usually put on it, it is the same as if the lease was directly conformable to the power. I think that practice *has* applied that qualification to the reservation of a general power of re-entry; and, as to the difficulty of determining what is reasonable, I know no difference between determining what is reasonable on this subject and on any other subjects; and on other subjects, every court has to determine it. With respect to the qualification of the power for re-entry by the sufficiency of distress, though I cannot agree with the learned judge, who I think is as old a sage of the law as myself, (I believe he came to the bar in the same term with me,) that the statute of 4 *Geo.* 2. is imperative, yet it is impossible for me to deny, that the statute of 4 *Geo.* 2. and the general inclosure act, and all the practice to which I have been alluding, do establish, beyond all question, that it is a reasonable execution of a power, even where this clause of distress is put in. And, my Lords, when we are considering these circumstances, do let us attend a little to the extreme importance of the question before us in one respect. My Lords, you are not merely in the execution

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execution of a power to consider what is most beneficial, as between *A* the tenant for life, and *B* the remainder-man; but what is most beneficial to both and to each, with reference to the terms on which tenants are to be procured: and though, in this case, there is very little difference, perhaps, of convenience or inconvenience to the tenant, whether he is to pay on the day the rent is reserved, or fifteen days afterwards, yet, on the one hand, if there be that little inconvenience, I say that is a ground why, if the words of the power contained in the settlement will allow you to give those days, you shall not say that is a forfeiture of the lease: and, on the other hand, I say, though the *quantum* of convenience may be ever so small, yet that the principle pursued in deciding these cases, requires you to consider, not merely what is for the benefit of a person having an interest in one parcel of the inheritance, but what is for the benefit of the whole inheritance, and all the persons to take in it.

There is another way of putting it which is material; that is, if I am not wrong in my notions of the practice, to consider, if powers are to be executed for the benefit of all persons having an interest in the inheritance, in the first place, what will be the situation of persons who have those powers? That is a most serious consideration. If you are to adopt it as a principle, that, in a settlement where a power is given as nakedly in the terms of it as here, you are to execute that power in the precise terms, (and then you must take into your consideration, that no tenant for life, no trustee, nobody, in short, who has not an absolute inheritance in the estate, will ever think of executing a power without the direction of a court to tell him whether it is right or wrong,) the inconvenience would be infinitely great. But I am of opinion, that these words of qualification are words of course; (and I beg leave to recal the atten-

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tion of your Lordships to the language of Mr. Justice *Bayley* on this part of the case,) that this is an entry for non-payment of rent; and that the words of the settlement do not prohibit such a clause for re-entry for non-payment of rent as is here reserved; I think, we have the authority of the legislature for saying, that the qualifications in this power are reasonable; and, therefore, on these grounds, I shall only offer my opinion, that these leases are valid. Whether your Lordships may think proper to adopt that opinion, it is not for me to say; it is my duty to express that opinion.

Lord Redesdale.

Lord REDESDALE. — My Lords, I shall not trouble your Lordships at any length upon the question now before you; but, having attended throughout the discussion of it, and having, from a very early period of life, had much converse with that part of the law which enables me more particularly to consider cases of this description, (I mean conveyancing,) I think it my duty to offer a few words to your Lordships' consideration.

My Lords, with respect to what has been said as to general opinions upon the subject, and as to the practice of conveyancing, I cannot agree with much that has dropped; because I do conceive, that the law has frequently been decided, even in the construction of acts of parliament, upon what has been the general understanding of lawyers as to the true intention of those acts of parliament: and I will instance such a case under the statute of jointure. Your Lordships' House determined, in the case of *Drury* v. *Drury* (*a*), that a rent charge settled on an infant was, within the statute of jointure (*b*), a good bar of dower; not because such was the literal interpretation of the statute, but because such had been

(*a*) 3 *Bro. cases in Parl.* 492. (*b*) 27 *H.* 8. *c.* 10.

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the constant practice of conveyancers and others touching the subject: and it was expressly upon that ground, that your Lordships' decision at that time went; and I do conceive it is of the utmost importance that your Lordships should guide your judgment by that criterion, whenever it can be applied; for, otherwise, my Lords, all property must be in hazard. My Lords, it is more especially of importance with regard to marriage settlements. They are ordinarily prepared by those persons who employ their minds in the construction of deeds; and what persons of that description consider to be the law, acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject. How are you otherwise to understand the intent of parties in a settlement, which really and truly is as much, I may say, the view which the person who prepared it has upon the subject as the view of the parties; for the parties to a certain degree are ignorant of the words that are used, unless so far as they are advised by the persons whom they consult; and, therefore, the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and, wherever that has prevailed for a great length of time without impeachment in a court of justice, I take it, it ought to be considered as a true exposition of the law.

My Lords, I have thought it necessary to say so much upon that part of the case which has been just before your Lordships, because, I think, it would be highly dangerous to treat it in the manner in which it has been treated by a learned judge; and, with great deference, I cannot agree to what the learned judge said, because I think that practise most important to the consideration of the case, if you wish to preserve property to persons who are in possession, which may be defeated upon the construction

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struction of deeds and instruments, unless you give them that construction which Lawyers have constantly put on them, though not conformable to the precise rule, supposing that language to be literally understood.

My Lords, with respect to the case before you, it does appear to me, that it is necessary to consider, for the purpose of the final decision of this question, only the very words of the settlement under consideration. My Lords, words used in an instrument of this description must be construed according to the subject to which they are applied. The words here used, and which are in question, are applied to a power over a particular description of property; the power is one of three powers applying to three descriptions of property, and varying according to those three decriptions. First, of property which was under the settlement, let under leases for life or lives, or for years determinable upon life or lives; secondly, of property that consisted of lands not under such leases, but under rack-rent leases; and, thirdly, of mines. — Now, my Lords, may we not conclude, that the persons who formed this instrument contemplated these three species of property under the different circumstances in which they stood? And what is the manner in which they contemplated that property, which was leased for lives or years determinable upon lives? what did they mean to give by the power as to that property? They meant to give the same power of enjoyment which was possessed by the former owners of the property. By the nature of that property, no benefit would be derived from it for a considerable term of years, except by renewing the leases from time to time as they dropped; and, therefore, they gave a power to grant leases of that part of the property, reserving what had been before reserved in as beneficial a manner in all respects or more, giving the power to receive more, but not to receive less, not only as to the rent,

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rent, but as to the services. In every instance of a particular lease, every thing was to be reserved exactly in the same manner as it had been reserved by the prior leases, or at least not less beneficially. With respect to the second description of property, there the power is to lease at the best and most improved rent. My Lords, the words are added, "that can be reasonably had or obtained." Does that word "reasonably" really and truly, though perhaps introduced from caution into it, vary the instrument the least in the world? Would it not be a sufficient execution of the power, if the best and most improved rent had been obtained according to reasonable estimation of the best and most improved rent? But I should consider from that, although the rent reserved may not be the very best rent that could be got, yet, if it is fairly, and honestly, and reasonably, the best rent that can be reserved, without any fine derived by the person, who granted it, that it is a good lease: the word "reasonable," though introduced in this part of the instrument, is a word merely of caution, and would not alter, in any degree whatever, the construction of the power.

My Lords, with respect to the two parts of the property, that which is on leases for lives or for years determinable on lives, and that at rack rent, there were introduced words with respect to a power of re-entry on non-payment of rent, the first is expressed in one way, the second in another way. We find different terms used, as it seems to me, for this reason. With respect to the second description of property, the words are precise, "and so as in every such lease there be contained a clause of re-entry, in case the rent or rents thereupon to be reserved be behind or unpaid by the space of 28 days, after the times thereby respectively appointed for payment thereof." These words are precise. Why were there not precise words in the other power?

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power? For this manifest reason, because the other power referred to existing leases; it referred to that which was the ordinary mode of executing the power with respect to such property, namely, that, on the dropping of one life, the lease shall be surrendered, and a new lease, precisely similar, be granted for three lives. Why, my Lords, the powers of re-entry, which were contained in the former leases of every description, were the very powers to which the settlement meant to refer; with this addition, — that if, in any of the leases that existed, there was not a power of re-entry for non-payment of the rent, they meant that such a power should be contained in future; and, therefore, the words there used are of loose description. I think it is a mistake to suppose the words are precise: the words are not precise: the words are loose; and the great error, as it seems to my mind, in the opinions that have been formed pronouncing this lease invalid, is in the supposition that the words are precise. I repeat they are not precise, and are merely a note or memorandum intimating, that a power of re-entry is to be reserved; and if, in the former leases, such a power was not reserved, (and probably the person who made the settlement had not an opportunity to look into all the leases to see the form in which they were made,) then, there should be such a power reserved; but, in any other respect, that they should be in conformity to the prior leases. My Lords, it appears in the case of the lease in question, that the power of re-entry was reserved in the former lease, not simply on the non-payment of rent; but it was reserved on the non-performance of the services, such as a service at the mill, a reservation of a capon; if the engagements were not observed, the power of re-entry extended to the whole. My Lords, taking it, therefore, that the meaning of the settlement was this, not to give any precise direction

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pirection with respect to the nature of the power, but to give a general direction in the nature of a memorandum, if I may so express it, that there should be a power of re-entry, — is not that the natural construction of the words, and is not the construction, which is attempted to be put upon the words, a forced construction; an attempt to make them more strict than they really are?

My Lords, suppose a contract was entered into between two persons, one of them having the property, and the other willing to take that property, and that contract purported, that there should be in the lease to be granted under that contract, a power of re-entry for the non-payment of the rent, how would that contract be executed, if it was to be specifically performed under a decree of a court of equity? Would a court of equity have ever thought they were compelled, under the terms of that contract, by those words to require, that the power of re-entry should be a power of re-entry absolutely upon the non-payment of the rent at the day, and without the common and ordinary provision, that it should only be in case there was not a sufficient distress? Would not those words be construed by what was the common and ordinary practice? The common and ordinary practice, certainly, is to frame a power of re-entry in the manner in which the power of re-entry in this lease is framed. My Lords, what must have been in the mind of the conveyancer who prepared this settlement, when he inserted in the settlement the proviso, that a power of re-entry for non-payment of rent should be reserved without expressing more? Must he not have had it in his mind, according to the usual habit of persons of that description, that this was a species of note or memorandum which would have been expressed in a similar manner in the contract for a lease to be executed in pursuance of the settlement? My Lords, I do

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do, therefore, conceive, that, in this case, it must be taken to be the intention of the parties to the instrument, not to be precise with respect to the terms in which the power of re-entry was to be reserved; but, merely, to give a note, signifying, that some power of re-entry should be reserved for non-payment of rent; meaning thereby that, wherever that power did exist in the former leases of the same lands, it should be inserted in any new leases; and that, wherever no such power had been reserved, then, that a power should be inserted such as would be required under such a contract as I have described.

My Lords, the more I consider the subject, the more I feel convinced that all the doubt which has been suggested upon the subject has been founded upon a construction of the words of this instrument, which, I submit, they do not by any means bear. They were not intended, as it has been supposed, to express precisely and positively what should be done. They were intended to refer to the leases that had been previously executed of the same property, to provide that the rent should be reserved in as beneficial a manner in every respect as before; and that if there was an omission in the former leases of the power of re-entry, that a power should be given; that is, such a power as a court of equity would insert in a lease under a contract.

But suppose it had not been a question before a court of equity, but before a court of law, — suppose the person who entered into the contract had executed a lease, with a power in the terms in which the power is conveyed in this lease; or suppose, on the contrary, he had executed it with a power of re-entry upon non-payment of the rent at the day, and the question had been — whether, in either of those leases, in a court of law, the contract had been properly executed or not? Would a court of law have differed from a court of equity on the

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the subject, if they had said — In what manner will a court of law execute such a contract as this? in what manner would a person who was employed as a conveyancer in the habits of business, have framed a lease under such a contract? — and then taken it to be a proper or an improper execution of the contract, according to the interpretation given to that contract by men habitually engaged in framing such contracts? Upon the whole, therefore, it does appear to me, that the lease is a valid lease, because it is made, as it is found by the special verdict, in conformity to the other leases; and I consider the words of the settlement, referring to those leases, to have the effect of saying in this particular case — where there has been a power of re-entry for non-payment of rent, a similar one shall be reserved. If the question had arisen, on the renewal of a lease containing no such power, how the power of re-entry was to be reserved, then I should say, that it was to be reserved according to the practice of the owner of the estate in letting leases of other parts.

Therefore, upon the particular words of the settlement of 1757, and not upon any general view of the case, I conceive, that this lease ought to be supported, and, consequently, that the judgment of the Exchequer Chamber should be reversed, and the judgment of the King's Bench affirmed.

The House, accordingly, on the motion of the Lord Chancellor, reversed the judgment of the Court of Exchequer Chamber, and affirmed the judgment of the Court of King's Bench.

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May 12.

The court will not set aside the justification of bail on account of perjury subsequently discovered, but will leave the party to his indictment for perjury.

PELL Serjt. moved for a rule *nisi* to discharge the rule for allowance of bail in this cause, on the ground of gross fraud and perjury; one of the bail having sworn on the 5th of *February*, that he was the occupier of a house, which, but four days before, he had sworn to be his brother's. *Pell* referred to *Gould* v. *Berry* (*a*). But,

The Court thought that case not in point, and intimating that the plaintiff's remedy was by indicting the bail for perjury, *Pell*

Took nothing by his motion (*b*).

(*a*) 1 *Chitty's Rep.* 143. (*b*) *Dallas* C. J. was absent.

SMITH v. WILTSHIRE and Others.

May 14.

Some constables, under a warrant to search a house for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing, at the same time, to tell the owner of the house searched, whether they had any warrant or no: Held, that they were within the protection of the stat. 24 *G.* 2. *c.* 44.; and that an action against them ought to have been commenced within six months after the grievance complained of.

TRESPASS. At the tria before *Burrough* J., *Taunton* Spring assizes, 1821, it appeared, that the Defendants, who were constables, searched the Plaintiff's house under a warrant for the discovery of some black kerseymere, which had been stolen. They found no black cloth, but they took cloth of other colours, which they carried before a magistrate. Upon

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being asked whether they had a warrant, they refused to give any answer. The action not having been brought within six months after the alleged trespass, it was contended, that the Defendants as constables were protected by the statute 24 *G.* 2. *c.* 44. *s.* 8.; and the jury, under the direction of the learned Judge, found a verdict for the Defendants.

Pell Serjt. on a former day moved that this verdict should be set aside, and a new trial be granted, on the ground that, as the Defendants were specifically authorised to take black cloth, in taking any cloth other than black they were not acting as constables protected by the statute, but as mere unauthorised trespassers, so that the jury should have been directed to find for the Plaintiff. He cited *Price* v. *Messenger* (*a*) as expressly in point; and contended that, unless the Plaintiff was bound down by the last case of *Parton* v. *Williams* (*b*), the previous cases of *Money* v. *Leach* (*c*), *Milton* v. *Green* (*d*), *Bell* v. *Oakley* (*e*), *Postlethwaite* v. *Gibson* (*f*), shewed that the protection of the statute only extended to cases where constables were acting in obedience to a warrant from a magistrate.

The Court having taken time to consider,

DALLAS C. J. now delivered the judgment of the Court. This is an action of trespass for breaking and entering the Plaintiff's house, and seizing his goods; and, also, in another count, for seizing his goods only, brought against constables and others acting in their aid. The Defendants produced at the trial a warrant of a justice of peace, commanding them to search the

(*a*) 2 *B.* & *P.* 158.
(*b*) 3 *B* & *A.* 330.
(*c*) 3 *Burr.* 1742.
(*d*) 5 *East*, 233.
(*e*) 2 *M.* & *S.* 259.
(*f*) 3 *Esp.* 226.

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Plaintiff's house for certain cloth suspected to have been stolen, and to seize it. They, accordingly, searched and seized certain cloth not strictly falling within the description of the warrant. The action was not brought within six calendar months from the time of seizure. The question is, whether the Defendants are entitled to the benefit of the statute 24 *Geo.* 2. (*a*)? We are of opinion that they are.

The case of *Parton* v. *Williams* and others (*b*), is in point, where the Defendants, having a warrant to seize the goods of *A.*, seized by mistake the goods of *B.*, and the Court held the action ill brought after the lapse of six calendar months. All the judges then held, that the 8th sec. of 24 *Geo.* 2. was intended to give to constables, some benefit not given by the 6th section, observing, that the 6th section protected them absolutely and at all times against any action for acts falling within that section, namely, *acts done in obedience to a warrant*, and that it was nugatory to limit to six months by the 8th section, actions, which, by the 6th section, could not be brought at all. It is true, that, in *Parton* v. *Williams*, the case of *Price* v. *Messenger* and another (*c*) does not appear to have been cited, where the Defendant, having a warrant to search for and seize stolen sugar, seized certain sugar which was not stolen, and also certain tea and nails; and where one of the judges is reported to have said, that, when the Defendants seized the teas, they were not acting in obedience to the warrant. But that point did not there arise; for the Defendants had suffered judgment by default as to the teas and the nails; and the decision was, that the

(*a*) *C.* 44. *s.* 8.
(*b*) 3 *B.* & *A.* 330.
(*c*) 2 *B.* & *P.* 158.

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Defendants did act in obedience to the warrant, within sect. 6., although the sugar seized turned out not to have been stolen: and no question whatever arose on sec. 8.

The only case, therefore, that militates against *Parton* v. *Williams*, is the case, which was there fully considered of *Postlethwaite* v. *Gibson* (a). That, however, was only the opinion of one very learned judge at *nisi prius*, and is the less to be regarded, because the Plaintiff there ultimately submitted to be non-suited, so that the opinion could not afterwards be questioned. That case, therefore, was properly disregarded in *Parton* v. *Williams*.

In *Parton* v. *Williams*, the court did not expressly decide that the 8th sect. applies to all cases of constables acting as such, but we think that their reasoning extends to such construction, and that such is the true construction. The words *as aforesaid*, there refer either to the words immediately preceding, namely, *for any thing done in the execution of his office*, to which extent parties are protected by the sect. 8th, and it would be strange if constables were not equally protected; or else they are explanatory only of the word "person," and sect. 8, by the words "or person acting as aforesaid," means any person, not an officer, who acts by order and in aid of an officer. *Godin* v. *Ferris* (b), in trespass, and *Saunders* v. *Saunders* (c) in trover shew, that, when a statute limits the time of bringing any action against an officer to a certain time, from the time of the act by him done, the time must be computed from the original seizure of the goods.

(a) 3 *Esp.* 226.
(b) 2 *H. Bl.* 14.
(c) 2 *East*, 254.

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Between ELIZABETH MURTHWAITE, JOHN MACPHERSON, and CHARLOTTE, his Wife, and Others, - - - , Plaintiffs; May 23

AND

GEORGE BARNARD, MARIA BARNARD, CHARLES MURTHWAITE, JOHN CUTHBERTSON, and Others, - - - - Defendants.

And between GEORGE BARNARD, an Infant (by his next Friend), - - Plaintiff;

AND

ELIZABETH MURTHWAITE, JOHN MACPHERSON, and CHARLOTTE, his Wife, JOHN CUTHBERTSON, and Others, - - Defendants.

Devise to three trustees of all his freehold, leasehold, and copyhold estates, and all his personal estate, in trust, to pay legacies and annuities (the annuities to be paid out of his 3 *per cent.* stock), and all the rents, issues, profits, dividends, interest, profits and produce of the residue of his estate and effects, to his three nieces, *E. M.*, *M. M.*, and *C. M.*, share and share alike, for the term of their respective lives; and after the decease of them, or either of them, that the lawful issue of them, and each of them, should have his or her mother's share of such rents, &c. for life; and if either of the nieces should die in the life-time of the other, without issue, the share of her so dying should be divided equally between the survivors of the nieces for their respective lives, and afterwards by the issue of the survivors of the nieces; and if all the nieces save one should die without issue, such one should have the whole for her life; and, after her decease, the issue of such niece, if more than one, should enjoy the whole, share and share alike; if but one, should enjoy the whole alone; such parts as were freehold to them, if more than one, their heirs and assigns, as tenants in common, and not as joint tenants; if but one, to him or her, his or her heirs and assigns. If all the nieces should die without issue, the whole to go to devisor's next male heir of the name of *M.*, his heirs and executors. *M. M.* married *G. B.*, who died leaving *M. M.* and one son. *C. M.* married, but had no issue. Two of the trustees died. A large surplus of personal estate remained, after paying debts, legacies, and annuities. Held,

THOMAS MURTHWAITE, by his last will and testament, duly executed and attested, so as to pass freehold estates, devised to Mrs. *Margaret Murthwaite*, Mr. *John*

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1st, That the surviving trustee had the legal estates in the freehold tenements devised.

2dly, That the nieces took no legal estate in the freehold tenements.

3dly, That the son of *G. B.* took no legal estate in those tenements, and would take none if he survived the three nieces.

4thly, That if the will had commenced with the words, "all the rents, &c." and the passage before these words had been omitted, the three nieces would respectively have taken under the will, in the said freehold tenements, estates for life; with cross-remainders between them for life, in the event of one or two of them dying without lawful issue.

5thly, That the said *G. B.* would now have an estate in tail in remainder in his mother's one undivided third part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters; and that he would have an estate in tail in the whole of the said freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born.

Mr. *John Cuthbertson*, and Mr. *John Janes*, all his freehold, copyhold, and leasehold estates, and all his personal estate and effects whatsoever; in trust, to pay thereout the several legacies and annuities in his will specifically mentioned, all which annuities, he thereby ordered to be paid out of such sum as should be standing in the 3 *per cent.* consolidated bank annuities in his name, at the time of his decease, and that the said annuities should commence from and immediately after his decease: all the rents, issues, dividends, interest, profits and produce of all the residue of his estate and effects, of what nature, kind, or quality whatsoever, as well real as personal, which he should die seised or possessed of, interested in, or any way entitled to, at the time of his decease, he devised unto his three nieces, *Elizabeth Murthwaite*, *Maria Murthwaite*, and *Charlotte Murthwaite*, daughters of his brother, equally to be divided between them, share and share alike, for the term of their respective natural lives, subject to such provision and disposition as was therein after provided, concerning the house and premises then in his occupation, with the furniture, plate, jewels, books, linen, and implements of household then therein, and his carriage and horses. And from and after the decease of them, or either of them, he declared it to be his will and meaning, that the lawful issue of them, and each of them, should have, and enjoy his or her mother's share of such rents, issues, dividends, and profits, for

life,

life, in like manner, and he declared it to be his further will and meaning, that if either of his said nieces should happen to die in the life time of the others or other of them, without issue of her body lawfully begotten, that the share of her so dying without issue, should go to and be shared, and divided equally between the survivors of his said nieces, for their respective lives, and afterwards by the lawful issue of the survivors of his said nieces, in like manner, and if all his said nieces and their issue, save one, should die without issue, lawfully begotten, then he declared it to be his will and meaning, that such surviving niece should have and enjoy the whole of the rents, issues, dividends, interests, and profits of such residue of his estate and effects, for and during the term of her natural life; and from and after her decease, he directed that the lawful issue of such surviving niece, if more than one, should have and enjoy the whole of the rents, issues, dividends, interest and profits of all such residue of his estate and effects, equally between them, share and share alike. And if but one, then that such only one should have and enjoy the whole of such part thereof as was personal, to and for his or her own use and benefit. And to hold so much, and such part and parts thereof as were freehold to them, and each of them, if more than one, their heirs and assigns as tenants in common, and not as joint tenants; and if but one, then to such only one, his or her heirs and assigns, for ever. And that they should hold so much, and such parts thereof as were copyhold, at the will of the lord or lords, lady or ladies of the manor or manors, of which the same were holden, in like manner. And if all his said nieces should die without issue, then from and after the decease of the survivor of them without issue, he devised the whole of such residue of his estate and effects, as well real as personal, and as well freehold as copyhold, to his next

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 male

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male heir of the name of *Murthwaite*, to hold to such male heir, his heirs, executors and administrators in like manner.

The testator died on the 23d *November*, 1808, without having revoked or altered his will, and leaving his said three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, then *Maria Murthwaite*, and *Charlotte Macpherson*, then *Charlotte Murthwaite*, and *Margaret Murthwaite*, *John Cuthbertson*, and *John Janes*, him surviving, and the testator left his said three nieces, his heirs at law, and likewise his customary heirs.

Margaret Murthwaite, and *John Janes*, alone proved the will of the testator.

Maria Barnard, then *Maria Murthwaite*, in the year 1809, intermarried with *George Barnard*, who died on the 5th *October*, 1817, leaving *Maria* his wife surviving; and there was issue of the said marriage only one child, viz. *George Barnard*.

In the year 1814, *Charlotte Macpherson*, then *Charlotte Murthwaite*, intermarried with *John Macpherson*, but they have at present no issue.

John Janes, one of the executors and trustees of the testator, died in the year 1814, leaving *Margaret Murthwaite*, and *John Cuthbertson* his co-trustees, him surviving, and *Margaret Murthwaite* died in the year 1816, leaving *John Cuthbertson*, and also her said daughters, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson*, surviving her.

A very large surplus of the testator's personal estate and effects remains after paying his funeral and testamentary expences, and his debts and the legacies, and annuities bequeathed by him.

Charles Murthwaite, would now be the next male heir of the testator of the name of *Murthwaite*, in case the said *Elizabeth Murthwaite*, *Charlotte Macpherson*,

pherson, and *Maria Barnard*, were now dead without leaving issue. 1821.

On the hearing of this cause before the Vice-Chancellor, his Honour directed this case to be made for the opinion of this Court, and that the questions should be,

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1st. What estate and interest the said *John Cuthbertson*, the surviving trustee, now has under the said will of the said testator, in the freehold tenements devised to the said *Margaret Murthwaite*, *John Cuthbertson*, and *John Janes*, as aforesaid.

2d. What estates the said testator's said three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson*, respectively took under the said will of the said testator, in the said freehold tenements?

3d. Whether the said *George Barnard* now has any, and what estate in the said freehold tenements, and what estate he will have in the freehold tenements, in case he shall be the only issue of the three nieces living at the death of the survivor of them, no other issue having been born?

In case the Court shall be of opinion, that by the will as above stated, the whole legal estate in fee simple in the freehold tenements, is now vested in *John Cuthbertson*, then in case the will had commenced with the words, "all the rents, &c." and the passage before these words had been omitted,

4th. What estates the said testator's said three nieces, *Elizabeth Murthwaite*, *Maria Barnard*, and *Charlotte Macpherson*, would respectively have taken under the said will of the said testator, in the said freehold tenements? and,

5th. Whether the said *George Barnard* would now have any, and what estate in the said freehold tenements, and what estate he would have in the freehold tenements, in case he shall be the only issue of the three nieces

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nieces living at the death of the survivor of them, no other issue having been born?

Hullock Serjt. The three nieces of the devisor took estates tail in the freehold and copyhold estates, with cross remainders, and the personal property in thirds absolutely; for where a limitation of a freehold will carry an estate tail, in the case of personalty, the first legatee takes absolutely. (a)

The estates in the freehold depend upon the meaning to be put upon the word *issue*; the question being, whether by that word is meant issue in the large and indefinite sense, or only the immediate children of the nieces; and whether the limitations beyond the issue are to depend on a failure of issue generally, or on a failure of the issue of the nieces at their respective deaths. The testator's general intention was, that all the issue of his nieces should take, and not that the property should be confined to their children only; he could not have intended, that if all the children of the nieces should die in their mother's lifetime, leaving grandchildren, such grandchildren should be excluded and the estate go over; and yet, this might very easily happen, if the nieces take only estates for life. There is no case in which such general words as the present have been confined to a dying without issue at the time of the death. The word *issue* is *nomen collectivum*, and takes in the whole generation, *ex vi termini*. (b) *Lord Beauclerk* v. *Dormer* (c); *Saltern* v. *Saltern* (d); *Attorney-General* v. *Hird* (e); *Doe dem. Ellis*, v. *Ellis* (f); *Crooke* v. *De Vandes* (g); *Barlow* v. *Salter* (h); *Tenny dem. Agar*, v. *Agar*. (i)

(a) 9 *Ves.* 203.
(b) *Per Hale*, in *King* v. *Melling*, 1 *Ventr.* 229.
(c) 2 *Atk.* 308.
(d) 2 *Atk.* 376.
(e) 1 *Bro. C.C.* 170.
(f) 9 *East*, 386.
(g) 9 *Ves.* 203.
(h) 17 *Ves.* 479.
(i) 12 *East*, 261.

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The cases of *Porter* v. *Bradley* (*a*), *Roe* v. *Jeffery* (*b*), *Forth* v. *Chapman* (*c*), and others of a like nature, may be distinguished from the present, both as to the intention of the devisor and the expressions used. Where the general intent of the devisor conflicts with some particular intent, the particular intent must be sacrificed, *King* v. *Burchell* (*d*), *Robinson* v. *Robinson* (*e*); and the Court will pursue the construction adopted in *Doe dem. Dodson*, v. *Grew* (*f*), and in *Denn dem. Webb*, v. *Puckey*, (*g*). The trustees took no legal estate in the realty, for there was personalty out of which they might discharge all the legacies; and, according to the limitations in this will, the realty becomes vested by the statute of uses in the *cestui que* trust. An estate to trustees, in trust to let *A.* and *B.* take the rents and profits, is an estate vested in the *cestui que* trust. *Bro. Ab.* tit. *Feoffment*, *pl.* 52. *Broughton* v. *Langley*. (*h*) *Kenrick* v. *Lord W. Beauclerk*. (*i*) *Doe dem. Leicester*, v. *Biggs* (*k*) *Right dem. Phillipps*, v. *Smith*. (*l*)

Blosset Serjt. The trustees take an estate in fee; the nieces, estates for life, with remainder to their issue in tail, and cross remainders between them. *G. Barnard* takes a vested remainder in tail in his mother's share, subject to be divested, in part, by after-born issue of his mother, and a contingent remainder in the share of his aunts. The trustees take a legal estate in fee, for they have legacies and annuities to pay, and it does not appear that the personalty will certainly be sufficient for

(*a*) 3 *T. R.* 143.
(*b*) 7 *T. R.* 589.
(*c*) 1 *P. Wms.* 663.
(*d*) *Ambler*, 379.
(*e*) 1 *Burr.* 38.
(*f*) 2 *Wils.* 322.
(*g*) 5 *T. R.* 299.
(*h*) *Salk.* 678. *p.*
(*i*) 3 *B. & P.* 175.
(*k*) 2 *Taunt.* 109.
(*l*) 12 *East*, 455.

that

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that purpose, nor indeed, that it exists at all. They have also a legal estate, to support contingent remainders. The nieces take only an estate for life, because that is limited to them by the express and unambiguous words of the will. It is not necessary to dispute the cases cited on the other side, because they do not apply to first takers, where an estate for life is expressly given to them, and the remainder-men take as purchasers in tail; but they may apply to the remainder-man, and shew that he takes in tail; for it may be admitted, that it was never intended the heir at law should take till the whole of the issue was exhausted: if so, the words *for life*, as applied to the issue, must be rejected, and they must take in tail.

The following certificate was afterwards sent.

This case has been argued before us by counsel: we have considered it, and are of opinion,

1st. That *John Cuthbertson*, the surviving trustee, now has the legal estate in fee simple in the freehold tenements, devised by the will of the testator to *Margaret Murthwaite*, the said *John Cuthbertson* and *John James*.

2d. That, consequently, the testator's three nieces, *Elizabeth Murthwaite, Maria Barnard*, and *Charlotte Macpherson*, took no legal estate, under the said will, in the said freehold tenements.

3d. And that the said *George Barnard* has now no legal estate in the said freehold tenements, and will have none at the death of the survivor of the three nieces.

4th. That if the will had commenced with the words "all the rents, &c.," and the passage before those words had been omitted, the testator's three nieces would respectively have taken under the will in the said freehold tenements, estates for life, with cross remainders between them for life, in the event of one or two of them dying without lawful issue.

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5th. And that the said *George Barnard* would now have an estate in tail, in remainder, in his mother's one undivided third part of the said freehold tenements, subject to be divested, in part, by the birth of other children of his mother, whether sons or daughters; and that he would have an estate in tail, in the whole of the said freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

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May 23.

Medlycott v. Jortin.

Devise of land to devisor's grand-daughter, *A. M.*, for life; remainder to trustees, during the life of *A. M.*, to support contingent remainders; remainder to all and every the children in tail, with cross-remainders between them in tail; and, in default of issue of all and every the children of the grand-daughter, to devisor's daughter, *B. C. M.*, for life; remainder to such one or more of the children of *B. C. M.* as *B. C. M.*, by deed or will attested by three witnesses, should appoint for their lives; remainder to all and every the child and children of such daughter or daughters, to be appointed by *B. C. M.*, as aforesaid; and if only one should be appointed, to her and the heirs of her body; and if more than one should be appointed, all of them to take their mother's shares, *per stirpes*, as tenants in common, and not as joint-tenants; with cross-remainders between them, the children of such daughters, as to their mother's shares in tail; and, on failure of such issue of any one or more of such daughters, with cross-remainders to the others of their issue; and in default of appointment, and of any appointment not exhausting the whole fee, the land, or so much as should not be exhausted by appointment, to *B. C. M.* for life; remainder to all her daughters for their lives, with cross-remainders for life between them; remainder, during the lives of the daughters of *B. C. M.* and the survivor, to support contingent remainders; and, for default of issue of any or either of the daughters of *B. C. M.*, to *B. C. M.* and her heirs.

A. M. died, sole and intestate, leaving *B. C. M.* her heir at law, and heir at law of devisor. *B. C. M.* has nine daughters, many of whom are married and have issue: Held,

1. That *B. C. M.* has in the lands an estate for life, with an ultimate reversion to herself in fee.

2. That, in default of appointment, the daughters now living of *B. C. M.* have, respectively, in the lands estates for life in remainder, as tenants in common, with cross-remainders amongst themselves for life; with remainders to themselves in tail, respectively.

3. That, in default of appointment, the grandchildren of *B. C. M.* have no estate in the lands.

4. That *B. C. M.* has power by appointment to designate which one, or more than one of her daughters, is, or are, to take under the will; that if more than one are designated, they will take under the will as tenants in common for life; with remainder to their respective children, as tenants in common in tail; with cross-remainders between them (the children of the appointed daughters), in tail: such cross-remainders to take place, as well with regard to the shares of their respective mothers as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts.

HIS Honor the Vice-Chancellor ordered the following case to be made for the opinion of the Judges of this Court.

George

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George Hill, late one of his Majesty's serjeants at law, made his will in writing, in the following words (*a*): "This is the last will and testament of me *George Hill*, of *Rowell*, one of his Majesty's serjeants at law. I devise my estate at *Irchester* to my grand-daughter, *Ann Mannsell*, for her life; with remainder to my friends, *John William Bramston* and *John Jortin*, barrister at law, and their heirs in trust, only for and upon the several uses and trusts hereinafter mentioned (that is to say), for and during the life of my said grand-daughter, in trust only, to support the contingent estates hereinafter devised; and, after her decease, to all and every the children in tail, with cross-remainders between them in tail: and, in default of issue of all and every the children of my said grand-daughter, I devise the said estate to my daughter, *Barbara Cockayne Medlycott*, for life; with remainder to any such one or more of the children of such my said daughter as my daughter shall, by deed or will attested by three witnesses, appoint for their lives; with remainder to all and every the child and children of such daughter or daughters, to be appointed by my said daughter, as aforesaid; and if only one be appointed, then to her and the heirs of her body; and if more than one be appointed, then all of them to take their mother's shares, *per stirpes*, as tenants in common, and not as joint-tenants; with cross-remainders between them, the children of such daughters, as to their mother's shares in tail, and on failure of such issue of any one or more of such daughters; with cross-remainders to the others of their issue: and for and in default of such appointment, and of any appointment not exhausting the whole fee, I give and devise my estate at *Irchester*, or so much of the fee as shall not be exhausted by any appointment or appointments made as aforesaid,

(*a*) This is an exact transcript of the will, which is very confused.

to

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to my daughter, *B. C. Medlycott*, for life; with remainder to all her daughters, for their lives, with cross-remainders for life between them; with remainder, during the lives of all the said daughters of my said daughter *Barbara* and the life of the survivor, to support contingent remainders: and for default of issue of any or either of the daughters now living of my said daughter *Barbara*, I give the said estate to my said daughter *Barbara* and her heirs. I give all my real estate, except that at *Irchester*, to my said daughter *Barbara*, for her life, exclusive of her present or any future husband; with all and singular the same powers of appointment and disposition, rights and estates, as before given to her, over, in, or after the remainder of my *Irchester* estate, in default of issue of my said grand-daughter, *Ann Mannsell:* and I do declare that the profits of my said real estate last devised shall go to the several persons successively, to and in trust for whom they are authorized to be appointed. I give all my personal estate to my said trustees, whom I appoint executors of this my will: in trust, to retain thereout, for their own respective use, the sum of 200*l.* a-piece, for their trouble in executing the trusts of this my wi and to apply all the residue thereof, or so much as sh be necessary in or towards the payment of all my debts; and the surplus, if any, to invest in real estate, and settle the same to the use of the same person and persons respectively as should be entitled by this my will to the residue of all my real estates, except that at *Irche* and in case my personal estate should be defi pay all my debts and legacies, and the costs of the trusts thereof, then to raise the deficiency by sale or mortgage of a sufficient part of my real estate (except that at *Irchester*); and I do hereby declare, that the entirety of my copyhold estates whatsoever, whether surrendered or not surrendered to the use of my will, are included

included in the above devise of all my real estate, except that at *Irchester*; lastly, in case the equitable or beneficial interest of, in, or to all or any part of my real or personal estate, after payment of my debts and legacies, and the costs of executing the trusts of my will, is not already disposed of, or should, eventually, during my life or afterwards, become not disposed of, I give the same to my said trustees and their heirs, in trust for my said daughter, *B. C. Medlycott*, to and for her sole and separate use, exclusive of her present or any future husband as aforesaid."

The testator died on the 21*st* of *February*, 1808, leaving his grand-daughter, *Ann Mannsell*, daughter of his elder daughter, (who died in the testator's life-time,) and his daughter the Plaintiff, *B. C. Medlycott*, his co-heiresses at law; *Ann Mannsell* is since dead, unmarried, and intestate, leaving the Plaintiff, *B. C. Medlycott*, her heir at law. At the date of the said testator's will, and at the time of his decease, the Plaintiff had ten children, all daughters, one of them is since deceased, of full age, but unmarried, the nine others, all of full age, are, 1st, *Matilda Sophia*, now the wife of *Robert Austen*, LL. D., who has issue seven children now living; 2d, *Barbara Maria Cockayne*; 3d, *Mary Ann*, now the wife of *William Adams*, LL. D., who has issue six children now living; 4th, *Georgiana Cockayne*; 5th, *Sophia Cockayne*; 6th, *Caroline Eliza*, now the wife of *Thomas Phillip Mannsell*, Esq., who has issue five ...dren: 7th, *Catherine Cockayne*; 8th, *Frances Anna-* ... now the wife of *William Assheton*, Esq., but who ... issue; and, 9th, *Elizabeth Charlotte Cockayne*. The executors named in the will, duly proved it; but *John William Bramston* is since dead, leaving *John Jortin* sole surviving executor. All the married daughters of the Plaintiff, *B. C. Medlycott*, were unmarried at the death of the testator. The whole of the testator's estate

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at *Irchester* was freehold; the copyhold lands were descendible in the same manner as freehold lands at common law. The questions for the opinion of the Court were:

1st, What estate the Plaintiff, *B. C. Medlycott* had in the freehold and copyhold lands of the testator respectively?

2d, Whether the daughters then living of the Plaintiff, *B. C. Medlycott*, respectively, had any and what estate in the testator's freehold and copyhold lands respectively?

3d, Whether the grandchildren of the Plaintiff, *B. C. Medlycott*, or any and which of them, had any and what estate in the testator's freehold and copyhold lands respectively?

4th, Whether the Plaintiff, *B. C. Medlycott*, had any and what power of appointment over the testator's freehold and copyhold lands respectively?

Hullock Serjt., for the Plaintiff, contended, that *Ann Mannsell* took an estate for life in the *Irchester* property, it being immaterial what estate the trustees took; remainder to the trustees for her life only; remainder to her children in tail, with cross-remainders in tail; remainder to the Plaintiff for life, with a power of appointment in fee: and that, in default of appointment, the Plaintiff's daughters would take an estate as tenants in common for their respective lives; remainder, after the surviving daughter's decease, to all the grand-daughters as tenants in common in tail; and, for default of such issue, to the Plaintiff in fee. He argued, that the Plaintiff had the power of appointment in fee, chiefly from the expression in the will, "and in default of any appointment not exhausting the whole fee, I give, &c." With respect to the other real estate, though there was no disposition of the remainder in default of appoint-

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appointment, nor any devise to trustees; yet the same power of appointment being given, it might also exhaust the fee, and so must be construed a power of appointing in fee. *Barford* v. *Street* (*a*), *Whiskon and Cleyton*'s case (*b*), and *Sugd. on Powers*, 96, 97. were referred to, and *Liefe* v. *Saltingstone* (*c*), and *Dighton* v. *Tomlinson* (*d*), cited as nearest in point.

Lens Serjt., for the Defendant, allowing that it was immaterial what estate the trustees took, said that the power of appointment might either confer a bare power of selection or nomination to estates already limited by the will, or a power of appointing the quantity of estate to be received, as well as of nominating the party who should receive; and he argued, that the latter construction seemed the more reasonable. He then contended, that, in default of appointment, the objects of the devisor must be looked to, and that those objects could not be so well effected as by giving the daughters of the Plaintiff an estate tail.

Blosset Serjt., for the grandchildren, argued, that the Plaintiff had only a power of selecting the objects who should take estates carved out by the will, and could not herself appoint the quantity of estate to be received. From the clause which gave them a power of sale in certain events, he inferred that the trustees took an estate in fee, and he denied that the expression, " in default of an appointment exhausting the *fee*," afforded any inference that the Plaintiff had a power of appointing in fee; contending, that the devisor only meant, *in default of appointing all the shares of the property*.

(*a*) 16 *Ves.* 135.
(*b*) 1 *Leon.* 156.
(*c*) 1 *Mod.* 189.
(*d*) 1 *Com.* 194.

The

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The following certificate was afterwards sent:

THIS case has been argued before us by counsel: we have considered it, and are of opinion,

1st, That the Plaintiff, *Barbara Cockayne Medlycott*, has in the freehold and copyhold lands of the testator respectively an estate for her life, with an ultimate reversion to herself in fee.

2d, That, in default of appointment, the daughters now living of the Plaintiff, *Barbara Cockayne Medlycott*, have respectively in the freehold and copyhold lands of the testator estates for life in remainder as tenants in common, with cross-remainders amongst themselves for life, with remainders to themselves in tail respectively.

3d, That, in default of appointment, the grandchildren of the Plaintiff, *Barbara Cockayne Medlycott*, have no estate in the testator's freehold or copyhold lands.

4th, That the Plaintiff, *Barbara Cockayne Medlycott*, has power by appointment to designate which one or more than one of her daughters is or are to take under the will: that if more than one are designated, they will take under the will as tenants in common for life, with remainder to their respective children as tenants in common in tail; with cross-remainders between them (the children of the appointed daughters) in tail; such cross-remainders to take place, as well with regard to the shares of their respective mothers as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
J. RICHARDSON.

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FIELDING and Others *v.* KYMER and Others.

May 26.

The circumstance of a principal's drawing bills on his factor, to be provided for out of the proceeds of goods consigned, does not authorise the factor to pledge the goods: therefore, where *A.* consigned goods to *B.* for the purpose of sale, at the same time drawing bills to the amount of 1588*l.* 5*s.* 7*d.* on *B.*, to be provided for out of the proceeds; and *B.* pledged the goods for 2500*l.* to *C.* (who knew that *A.* was the owner), and paid 294*l.* in discharge of one of the bills; and *C.* afterwards sold the goods for *B.* for 4033*l.*; it was held, that *A.* was entitled to recover from *C.*, in an action for money had and received, (in which 1533*l.* was paid into court,) the whole balance of 2500*l.*

THIS was an action for money had and received, to which the Defendants pleaded the general issue. At the trial before *Dallas* C. J., at the *London* sittings after *Michaelmas* term last, the jury found a verdict for the Plaintiffs for 2,500*l.*, subject to the opinion of this Court upon a case, of which the following is the substance.

The Plaintiffs carried on business as merchants in partnership at *Rio de Janeiro*, under the firm of *Gill, Fielding* and *Brander*: the Defendants were brokers in *London*. *Joseph Lyne* and Co. carried on business chiefly as commission merchants in *London*, and also as general merchants on their own account. In the beginning of *December*, 1819, *Joseph Lyne* and Co. received from the Plaintiffs' firm, a letter, dated *Rio de Janeiro*, 13th *October*, 1819, containing the following advice. "We ship by the *Fortitude*, *Clement Worts*, master, bound to your port, and addressed to your consignment, 533 bags of coffee of the first quality, invoice and bill of lading of which you have herewith, the former amounting to *Rs.*14,579 380; and, against the same, we have valued on you in six bills as particularized at foot; we have to request you will dispose of this consignment to the best advantage, and protect us by insuring against all risks." These bills, which were drawn at 60 days' sight, amounted to a total of 1588*l.* 5*s.* 7*d.* sterling, and among them was one for 294*l.* 5*s.* 6*d.*, payable to the order of *J. Carmichael*.

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The list was headed, "Note of bills drawn against shipment per *Fortitude*." The invoice accompanying the letter commenced thus, "*Rio de Janeiro*, 13th *October*, 1819. Invoices of 533 bags of coffee, shipped by (*a*) *Fielding*, *Brander*, *Avelyne*, and *Lyne*, on board the *Fortitude*, *Clement Worts*, master, bound for *London*, and consigned there to Mr. *Joseph Lyne* and Co., for sale, on account and risk of Messrs *Gill*, *Fielding*, and *Brander*." The bill of lading contained a like consignment of the goods to *Lyne* and Co.

The ship arrived with the coffee on board, in the beginning of *February*, 1820. On the 12th *February*, the coffee in question was put into the hands of the Defendants, as *brokers* for sale. *Charles Lyne*, a partner in the house of *Joseph Lyne* and Co., then asked the Defendants if they would make an advance upon it, to enable *J. Lyne* and Co. to meet the bills, and at the request of the Defendants, delivered the invoice to them. They consented to advance 2500*l.* upon the coffee, and, accordingly, on that day accepted a bill for this amount at two months, which *Joseph Lyne* and Co. immediately discounted with their bankers, and the bill for 294*l.* 5*s.* 6*d.*, mentioned in the letter of 13th *October*, was paid out of the funds so raised. All the other bills were provided for by the Plaintiffs, and were never any charge upon *Jos. Lyne* and Co., or their estate. At the time of the above advance, the coffee being in the *West India* dock warehouses, the transfer order to the dock company was handed to the Defendants, and they were empowered to sell; but they were to consult with *Jos. Lyne* and Co. as to the price before they sold. The Defendants

(*a*) In *October*, 1819, *Gill* had retired, and a new partnership was formed between the remaining partners, under the firm of *Fielding*, *Brander*, *Avelyne*, and *Lyne*.

ants

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ants sold the coffee for *Jos. Lyne* and Co. on the 15th *March*, 1820, and rendered an account, by which it appeared, that the net produce of the sale was 4033*l.* 0*s.* 6*d.* On the 15th of *February*, 1820, *Joseph Lyne* and Co. stopped payment, and a commission of bankrupt was afterwards issued against them. At the time when they stopped, they were indebted to the old firm of *Gill*, *Fielding*, and *Brander*, and likewise to the new firm of *Fielding*, *Brander*, *Avelyne*, and *Lyne*.

The bill for 2500*l.* was duly paid by the Defendants. The jury found specifically as a fact, that, at the time when the Defendants agreed to advance the 2500*l.*, it was known to them, that the coffee was the property of the Plaintiffs. The Defendants paid into court the sum of 1533*l.* 1*s.* 6*d.*

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover the entire balance of 2500*l.* or only part of it. If the Court should be of opinion, that they were entitled to recover the whole, then the verdict was to stand. If less than the whole, the verdict was to be reduced accordingly. If the Plaintiffs were not entitled to recover, a nonsuit was to be entered.

Taddy Serjt., for the Plaintiffs. The points for the decision of the Court will be three.

The Plaintiffs contend, first, that they are entitled to the whole balance; secondly, that, at all events, the Defendant can only deduct the sum of 294*l.* 5*s.* 6*d.* applied by the house of *Lyne* and Co. to the payment of the bill drawn by the Plaintiffs; and, thirdly, that the form of action makes no difference, save that, in the action as brought, the Plaintiffs can recover no more than the money received by the Defendants. And first, the general rule (not peculiar to the law of *England*)

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that a factor cannot pledge the goods of his principal, applies here. In *Martini* v. *Coles* (a), wherein all the cases were collected, that principle was recognized, and the point solemnly decided. If a factor, having a specific authority, exceeds it, he who deals with such factor, must take the consequence of not enquiring. (b) In some of these cases, the advance has been general, and on the credit of the goods of third persons; but that makes no difference. It does not cease to be a pledge, because it is more or less extensive, or more or less complicated with the property of others. In this case, there is the additional fact, that, at the time when the advance was made, it was stated to the Defendants, by *Lyne* and Co., that the goods were drawn against; the Defendants knew that the goods were consigned for sale, and took the risk of *Lyne* and Co. applying the advance properly. No hardship, therefore, can be urged on behalf of the Defendants, who had perfect knowledge of all the facts. They do not take up the bills drawn by the Plaintiffs on *Lyne* and Co., but they put an acceptance for the whole advance, into the hands of *Lyne* and Co., out of the proceeds, of which acceptance not one of the bills is paid, save that for 294*l.* 5*s.* 6*d.*

As to the second point, more facts should have been found, before the Defendants can be entitled to make the deduction of 294*l.* 5*s.* 6*d.* It is not enough, that the money happens to be applied to the payment of the bill drawn by the Plaintiffs. The authority to the factor is to sell, and to apply the proceeds of the sale in discharge of the Plalntiffs' bills. The principal, therefore, contemplates the sale of the goods before the arrival of the bills; but no sale takes place till long afterwards, and before it does take place, *Lyne* and Co.

(a) 1 *M.* & *S.* 150.
(b) *De Bouchout* v. *Goldsmid*, 5 *Ves.* 213.

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stop payment, and a commission issues. Besides, the house of *Lyne* and Co. was indebted to both firms, and by taking the bill into the account, the balance would be altered.

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As to the third point, the form of action only precludes the Plaintiffs from recovering more than the sum received. The Plaintiffs go beside the agreement between *Jos. Lyne* and Co. and the Defendants, they find the goods turned into money, and make their claim for the amount, affirming only the fact of the receipt of the money. If the action had been brought on the agreement, that must have been adopted; but the Plaintiffs only follow the money as they follow the goods; they were strangers to the conversation. *Smith* v. *Hodson* (*a*) is the only case which looks the other way. In *Wright* v. *Campbell* (*b*), Lord *Mansfield* says, "If a factor pays money over, with notice to a third person, then it may be followed in the hands of such third person; for, in such case, it remains in his hands just as it did in the hands of the factor himself." *Shipley* v. *Kymer* (*c*) is in favour of the Plaintiffs. *Pulteney* v. *Kymer* (*d*) (cited in *Martini* v. *Coles*) is the only case on the other side; and in that case, the different decisions on the subject were not brought before Lord *Eldon*.

Bosanquet Serjt., for the Defendants. The Plaintiffs are not entitled to recover in this form of action, inasmuch as the suing for money had and received amounts to a recognition of the original contract under which the money is obtained. If the Defendants have tortiously converted the money, it is no longer the money of the Plaintiffs, but the money of the Defendants, and in that view of the case, trover is the proper remedy.

(*a*) 4 *T. R.* 211.
(*b*) 4 *Burr.* 2046.
(*c*) 1 *M. & S.* 484.
(*d*) 3 *Esp. N. P. C.* 182.

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When *Joseph Lyne* and Co. were invested with authority to sell, and pay the bills transmitted to them, a general authority to raise money for the purpose of paying the bills must be implied. The existence of this authority the Plaintiffs might have disputed in trover, but by suing in *assumpsit* they admit it. *Smith* v. *Hodson* is a strong authority for the Defendants on this point. The Defendants do not dispute the general rule, that a factor cannot pledge the goods of his principal, nor that the purchaser must take the consequence of dealing with one who exceeds his authority. No distinction, it may be admitted, now exists in the law, whether a person dealing with a factor knows him to be such or not; but the question here is, whether *Lyne* and Co. were not authorised to do what they have done, and the Defendants contend that *Lyne* and Co. had authority, because the bills were to be provided for by this particular cargo. The case of *Pulteney* v. *Kymer* is recognised in that of *Martini* v. *Coles*, and is distinguished by Lord *Ellenborough*: and the case put by *Bayley* J., in delivering his judgment, is strongly in favour of the Defendants. At all events, the Plaintiffs having received the benefit of the 294*l.* 5*s.* 6*d.*, are not entitled to claim that sum a second time. (*a*)

Taddy, in reply. From *Moses* v. *Macfarlane* (*b*) downwards, it has been held, that, by bringing an action for money had and received, the Plaintiff does not affirm the contract, but rather disaffirms it. The general doctrine is laid down in *Tenant* v. *Elliot*. (*c*) [*Park* J., to the same point is the case of *Clarke* v. *Shee*. (*d*) By bringing the action for money had and received, the Plaintiff only recognises that there is

(*a*) The case of *Duclos* v. *Ryland* was mentioned as pending in the Court of K. B., and being of the same complexion with this case.

(*b*) *Burr.* 1006.

(*c*) 1 *B. & P.* 3.

(*d*) *Cowp.* 197.

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ney in the Defendant's hands to which the Plaintiff is entitled, but he does not recognise any of the apparatus by which it got there.] As to the main question, if it is held, that a broker may advance to a factor, where the consignor draws on the factor, the whole doctrine which prohibits pledges by a factor will be undermined. The case of *Pulteney* v. *Kymer* is not *ad idem* with this case. The present Defendants knew that the goods were consigned for sale.

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DALLAS C. J. Speaking at the moment, and for myself, I entertain no doubt on this case. The general rule, that a factor has no authority to pledge the goods of his principal is quite clear; and I consider this as a pledge. Now how is this attempted to be distinguished from the other cases? Bills are drawn against the consignment; and, it is said, the drawing of the bills amounts to an authority to the factor to raise money to meet those bills. But is there any case of a consignment from the *West Indies*, where bills are not drawn, to be provided for out of the proceeds of the goods when sold? If the doctrine contended for were valid, in every such case of consignment the act of drawing bills would amount to an authority to pledge; — to a repeal of the well established and wholesome rule, that a factor cannot pledge the goods of his principal.

The facts of this case are very strong, for the Defendants had full knowledge that the goods on which they advanced the money were not the property of *Lyne* and Co., but the property of the Plaintiffs. *Le Blanc* J., in *Martini* v. *Coles*, says, "whether it might not originally have better answered the purposes of commerce to have considered a person in the situation of *Vos*, having the apparent symbol of property, as the true owner, in respect of that person who deals with him under an ignorance of his real character, is a question upon which it

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is too late to speculate, since it has been established by a series of decisions, that a factor has no authority to pledge, whether the person to whom he pledges, has or has not a knowledge of his being a factor;" and he goes on to say, "When brokers exceed their authority as brokers, and become pawnbrokers, by advancing money on the goods before sale, then they subject themselves to all risks." The only difference between the case now before the Court and that from which I have been reading, is that, in the latter, the brokers made advances to the factor, without knowing that he was not the owner of the goods; whereas, in the present case, there was actual knowledge, on the part of the Defendants, that the goods did not belong to those who pledged them. Can it, then, be said, that the factor had authority to raise money on the goods in his hands, because the bills were drawn against those goods? That assertion seems to me to beg the whole question. The Defendants cannot repeal the law by entering into an agreement with the persons on whom the bills were drawn; and, with the knowledge of the law (which knowledge must be presumed) they think fit to advance money to *Lyne* and Co, who are factors, on the goods of their principals. Can they avail themselves of their own illegal act, to defeat the rights of third persons? I should have no hesitation whatever on the case, had it not been for the mention of the case of *Duclos* v. *Ryland*, in which it is said, that Lord C. J. *Abbott* reserved a similar point. We will look into that case. On that ground, and on that ground only, is the decision suspended; and the opinion now given by the Court may be considered as final, unless this case is mentioned again.

PARK J. I entertain no doubt upon this case. The point that a factor cannot pledge the goods of his prin-

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principal, I consider to be settled. The difficulty presented to us in this case is, the fact that the principals residing abroad, drew their bills against the goods consigned to *Lyne* and Co. But it is the constant course of trade, for the merchant abroad to consign his goods, and draw bills, to be provided for by the proceeds of such goods, when sold. The question into which this case resolves itself, is, — did the Plaintiffs authorize *Lyne* and Co. to pledge the coffee to the Defendants? and I am of opinion, that no such authority can be deduced from the facts which form this case. I think the case of *Daubigny* v. *Duval* (*a*) important. In that case, the factor pledged the goods of his principal; and the Court held, that the principal was entitled to recover the value of them against the pawnee, on tendering to the factor what was due to him without any tender to the pawnee. Of the case of *Duclos* v. *Ryland*, I can form no judgment, not having looked into it. But I can hardly think, that Lord Chief Justice *Abbott* (after the class of cases, which I had always considered as having set the question of a factor's right to pledge the goods of his principal at rest) would reserve that question, as one requiring solemn decision at this day. Though it is settled, that the ignorance or knowledge of the broker, as to whether the goods on which he advances the money are the property of the person who pledges them or of a third person, makes no difference as to the liability of the broker, in cases where he has advanced money to a factor on the goods of his principal, the fact of the ignorance of the broker in such cases, is frequently pressed upon the courts as a great hardship. But such is not the case here; for it is specifically found, that, at the time when the Defendants agreed to advance the 2500*l.*, it was known to them that the coffee was the property of the Plaintiffs.

(*a*) 5 *T. R.* 604.

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BURROUGH J. This case appears to me to stand on the ordinary ground. A factor has, without authority, pledged the goods of his principal, which he has no right to do. I am therefore of opinion, that the judgment must be for the Plaintiffs.

RICHARDSON J. As at present advised, it appears to me, that the Plaintiffs are entitled to recover. The general rule, that a factor cannot pledge the goods of his principal would be frittered away, if a consignee were allowed to construe the drawing of bills by the consignor against the goods consigned, into an authority to pledge those goods. In this case, too, the sum advanced was mainly for the accommodation of *Lyne* and Co. The acceptance for the sum advanced to them on the coffee was immediately discounted by *Lyne* and Co. at their own bankers. This acceptance was for 2500*l.*, the amount of the bills drawn by the Plaintiffs against the coffee on which this advance was made, being only 1588*l.* 5*s.* 7*d.*, and to the payment of but one of these bills for 294*l.* 5*s.* 6*d.* was the sum advanced, applied by *Lyne* and Co. The Defendants made no enquiry as to the amount of the bills drawn by the Plaintiffs against the coffee; they enquired only into the value of the coffee, on which the advance was to be made. It seems to me, that the general rule must apply equally to cases where bills are drawn by the principal against his consignments, and to cases where no such bills are drawn.

As to the form in which this action is brought, I think there is nothing in the objection raised. It is said that, by this form of action, the Plaintiffs affirm the contract, as to the advance agreed on by the agent; but the action proceeds on the circumstance of the Defendant's having obtained and sold goods of the Plaintiff, without their consent or authority, and disaffirms any

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contract which *Lyne* and Co., as agents of the Plaintiff, may have made with the Defendants. In various cases, much stronger than the present, the party injured may waive the special injury, and declare for money had and received. Where goods of a trader, after an act of bankruptcy, are taken in execution, or otherwise disposed of without the concurrence of the assignees, they are not bound to sue in trespass or trover. They may waive the *tort*, and proceed in *assumpsit* for money had and received, to recover the produce of the sale.

The only point which has raised a difficulty in my mind is, the question of the right of the Defendants to deduct the sum of 294*l.* 5*s.* 6*d.*, with which *Lyne* and Co. paid one of the bills drawn by the Plaintiffs against the goods consigned. But it seems to me, that this must fall within the same rule as governs the rest of the case. *Lyne* and Co. having no authority to pledge, but only an authority to sell, I think the Defendants have no right to deduct that sum from the verdict; for it seems to me, that the assignees of *Lyne and Co.*, in settling their account with the Plaintiffs, will have a right to carry the sum to the credit of the estate of *Lyne and Co.*

Per curiam. The case may be considered as decided, if it be not mentioned again.

Judgment for the Plaintiffs (*a*).

(*a*) The case was not mentioned again.

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May 26.

WILLIAM WINSOR, SUSANNAH WINSOR, JANE BOUCHER, and THOMAZINE JAMES v. THOMAS PRATT, EPHRAIM BURFORD, and ISAAC SHEFFIELD.

A., on 17th *July*, 1812, made a will, by which he devised certain real estates to his wife for life; and, on her death, to *M. B.*; and, on the death of his wife and *M. B.*, to his executors in fee, upon certain trusts. The will, which was attested by three witnesses, concluded by stating that *A.* had signed his name to the two first sides, and his hand and seal to the last side of the will, which was written on three sides of a sheet of paper. *A.* put his name and seal at the end of the will, but did not sign his name to the two first sides. In *November*, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife, to her widowhood, and to strike out the devise to *M. B.*; the original date was struck out, and the day of *November*, 1816, was substituted. The will was never re-signed, re-published, or re-attested; but, in the following month, *A.* caused a fair copy of it to be made, and added one interlineation not affecting his real estate: but the copy was never signed, published, or attested. The will and fair copy were found locked up in a drawer at the residence of the testator, who died on the 24th *December*, 1816: Held, that the will was well executed; and that there was no revocation of it as it stood originally.

DETINUE to recover the title deeds of real estates, of which *Charles Reeks* died seised; plea general issue. The cause was tried before *Dallas* C. J. at the sittings at *Westminster* after last *Easter* term, when a verdict was found for the Plaintiffs, subject to the opinion of the Court, upon a case, of which the following is the substance. *Charles Reeks*, on the 17th *July*, 1812, made a will, by which he devised the rents and profits of the greater part of his real estates to his wife, for her life, and on her decease, to *Mary Burford*, the mother of his wife, for her life, and on the decease of his wife and her mother, he devised the same to his executors in fee. Upon trust to sell and divide the produce equally between his three sisters, *Jane Boucher*, *Susannah Winsor*, and *Thomazine James*, or to the issue of such of them as should happen to depart this life before the same should be receivable. He also devised other real estates

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to his wife in fee, and certain leasehold property and personalty, to her absolutely. After bequeathing some legacies, he directed his residuary estate to be sold, and the produce to be divided equally between his wife and his three sisters. The will, which was attested by three witnesses, concluded by stating, that he had signed his name to the two first sides, and his hand and seal to the last side of the will, which was written on three sides of one sheet of paper. The testator did put his name and seal at the end of the will, but did not sign his name to the two first sides. In *November*, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife to her widowhood, and to strike out the devise to her mother. The original date was struck out, and day of *November*, 1816, was substituted. The will was never resigned, republished, or re-attested, but in the following month, the testator caused a fair copy of it to be made, and added one interlineation not affecting his real estate. But the copy was never signed, published, or attested, and on the 24th *December*, 1816, the testator died without issue. The Plaintiffs, *Jane Boucher*, *Susannah Winsor*, the wife of *William Winsor*, and *Thomazine James*, were co-heiresses of the testator, and as such, claimed to be entitled to the real estates of which *Charles Reeks* died seised, subject to the dower of his widow. The widow claimed to be entitled to the whole of the estates under the devise. The will and fair copy were found locked up in a drawer at the testator's residence, the day after his death. The Defendants, whom he had appointed executors in *January*, 1817, obtained probate of the will of the 17th *July*, 1812, with the interlineations and obliterations: and having obtained possession of all the

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title deeds of the real estates, refused to deliver them up to the Plaintiffs.

The question for the opinion of the Court was, whether the Plaintiffs were entitled to recover, and to what extent, or in respect of which of the real estates of the testator mentioned in the said will. If the Court should be of opinion, that the Plaintiffs were entitled, the verdict to stand with nominal damages; the Defendants undertaking, by rule of Court, to deliver up all the title deeds to the Plaintiffs to which they might be entitled. But if the Court should be of opinion, that the Plaintiffs were not entitled to recover, then a nonsuit was to be entered.

Pell Serjt., for the Plaintiffs, made two points: first, that the will, as signed, was not well executed, and for this he cited *Right* v. *Price* (a); but this was rejected by the Court, as too clear for argument: secondly, that the obliterations and alterations amounted to a revocation, and avoided the will. He admitted that the cases of *Sutton* v. *Sutton* (b), *Larkins* v. *Larkins* (c), and *Short* v. *Smith* (d), shewed that an obliteration might be made so as to leave the will good *pro tanto*, though it might avoid the obliterated devises; but he relied mainly on the alteration of the date, which, he observed, distinguished this case from other cases of obliteration, and cited *Onions* v. *Tyrer*. (e) He urged that the will was never executed so as to satisfy the statute. (f) It was not executed in 1812, because the testator has declared that it should not be deemed a will of that date. The will, then, was a will of no date. It was not executed

(a) 1 *Doug.* 241.
(b) *Cowp.* 812.
(c) 3 *B. & P.* 16.
(d) 4 *East*, 418.
(e) 1 *P. Wms.* 343.
(f) 29 *Car.* 2. *c.* 3.

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in *November*, 1816; for the case finds that there was no re-publication.

Lawes Serjt., for the Defendants. The obliterations and alterations made by the testator in his will are inoperative, and do not amount to a revocation. The circumstances of the will do not fall within the statute of frauds; and the devise to the trustees is valid, though they may take the fee at an earlier period than the testator first intended. In this case there is no evidence of the existence of the unchanged *animus revocandi*; and an intention to revoke, resting in intention, and not carried into execution, is no revocation of a will previously made, *Doe* v. *Perkes*.(*a*) The date, on which much stress has been laid, is not essential; and *Larkins* v. *Larkins* (*b*) and *Short* v. *Smith* shew that interlineations are inoperative without a re-publication, and that obliterations not striking out the whole of the devise do not amount to a revocation.

Pell, in reply, insisted that the cases cited, the authority of which he did not dispute, were beside the present question, the alterations in this will not being partial, but affecting the whole subject matter of the will.

DALLAS C. J. The facts of this case are so completely in the possession of the Court, that it becomes unnecessary for me to recapitulate them. And two questions arise: first, whether the will of 1812 was duly executed; and, secondly, whether that will, supposing it to have been duly executed, has been cancelled

(*a*) 3 *B.* & *A.* 489. (*b*) 3 *B.* & *P.* 16.

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or revoked. And, upon the first point, it has been contended, though without laying any great stress upon the objection, that the will of 1812 was not valid for want of sufficient execution; inasmuch as the will, being on three sides of a sheet of paper, the testator states, at the end of the third side, that he has signed his name to the two first sides thereof, and his hand and seal to that side; whereas, in point of fact, he has not signed the two former sides, but only the last. And, to maintain this objection, the case of *Right, Lessee of Cater*, v. *Price* has been relied on, and particularly the following part of Lord *Mansfield*'s judgment in that case: "There are many particular circumstances in this case besides the general question. The testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He, therefore, did not mean the signature of the two first as the signature of the whole will. There never was a signature of the whole." Now, I own, as I understand this case and the principle on which it was decided, that it appears to me to turn directly the other way; for it shews an intention on the part of the testator, and an incapacity to carry that intention into execution. In that case, the will was on five sheets of paper, and the testator had signed two of them, and shewed an intention to sign the others, but was unable to do so; but, in this case, the will is written all on one sheet of paper, and the testator has signed it at the end. There, the intention of the testator was defeated by incapacity; here, the act of the testator points to nothing prospective; and, whatever might have been his intention at one time of signing the former sides, he has by his final signature abandoned that intention. In the first objection, therefore, there is no validity; and the case then resolves itself into the main question — whether

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the will of 1812, being a valid will, has been revoked? That question turns upon the facts of the particular case; and from them it appears that the testator never intended to die intestate. That he had no such intention in 1816, is evident from the fair copy of the altered will found among his papers after his death. The question, then, will be, whether, if he intended his altered will to stand in the place of the former, he has carried his intentions into execution; and it has been contended, that the obliterations amount to a distinct act of revocation of his former will. Now, the revocation of wills may be effected in many different ways; but the principle to be found in the books applicable to all of them is, that a mere intention, not carried into effect, does not operate as a revocation. The act done by the testator may be merely demonstrative of his intention; and I take the distinction to be, that where there is evidence of an intention to revoke, if that intention has not been carried into effect, the former will remains precisely as it was. In the case before the Court, all the evidence of an intention to revoke appears on the face of the will itself; but if the testator had intended to effectuate such revocation, it is not too much to suppose that he would have conducted himself differently. He might have torn the will, — he might have burnt or cancelled it; none of which acts he appears to have done. It seems to me that the testator did not intend to revoke the devises altogether, or to die intestate; but to make another will, merely altering some of the devises. And I take the rule to be, that where a testator designs to revoke a former will by an instrument making new dispositions of his property, he discovers only a conditional intention to revoke; or, in other words, his intention to revoke is so coupled in appearance with his new testamentary act, that, unless

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he completes such testamentary act by observing the formalities requisite to its perfection, he is not looked upon in law as manifesting a deliberate purpose of revoking. And, again: The effect of cancelling depends upon the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, the cancelling of the first being dependent thereon, ought to be looked upon as null and inoperative. My opinion goes on the broad ground, that, in my view of the facts belonging to this case, the testator only intended to carry his alterations into execution by a future will, which intention he never carried into effect. I, therefore, think that the original will is not void, and consequently that the Plaintiffs are not entitled to recover.

PARK J. I am of the same opinion on both points; nor do I think that the case of *Right* v. *Price* assists the first. That the testator has not signed the two first sides of the will is, I think, immaterial. The Court, indeed, seemed to me to dispose of this point in an early stage of the argument. The second, involving the great question in the case, has been so fully entered into by my Lord, that it will be unnecessary for me to go much at length into it. The difficulty presented to us arises from the erasures and interlineations, which, it is said, amount virtually to a revocation of this will. The statute of frauds has pointed out the mode of avoidance of wills, namely, by actual revocation; and says, that "all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn or obliterated by the testator, or by his directions; or unless the same be altered by some other will or codicil in writing, or other writing." The alterations in this will do not, in my opinion,

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answer the description given in the statute. The other modes enumerated by the statute are, burning, cancelling or tearing. Can it be predicated of this will that it was either burnt, cancelled, or torn? Even if it could, we must look to see whether the act done were done *animo revocandi*, a question, generally, for the jury, but, in the present case, for the Judges to determine. Now, the rule I take to be that which has been drawn by his Lordship from the case of *Onions* v. *Tyrer*. If the testator's intention were only to make obliterations on that paper with a further view, such bare intention will not, in point of law, amount to a revocation, though it were apparent from the case that the testator intended to execute the fair copy. And, in this view, I think the case of *Doe* v. *Perkes* does bear on the point before us; for nothing can be stronger than the feeling manifested by the testator in that case against the devisee when he began the work of destruction, though he afterwards became calm, expressed himself satisfied that it was no worse, and fitted together the pieces into which he had torn the will. The learned Judge who tried that cause left it to the jury to say whether the testator had done all he intended, or whether he was not prevented from completing the act of destruction which he intended; and the Court held, that this was properly left to the jury, and refused to disturb the verdict which was given in favour of the devisee. I recollect also a case which was tried before me in *Northumberland*, in which there was a similar result. I am clearly of opinion that the obliterations and alterations of this will, coupled with the circumstances of this case, do not amount to a revocation; and, consequently, that the judgment ought to be for the Defendant.

BURROUGH J. It appears to me that the statute of frauds is decisive of this case. It is by no means clear

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to me that the obliterations and interlineations alter the estate of the trustees, as to the freehold devise; but, supposing them to have this effect, I do not think that the case would be altered. I am satisfied that these are not obliterations or interlineations within the statute. Here is an inception of an act done by the testator, but no completion. The act of having a fair copy made, shews that something was meant to be done; but this testator, who was an attorney, must have known that the execution of this paper must have taken place in the presence of three witnesses, to make it valid as a will affecting his real estate.

I think there is no foundation for the objection raised on the non-signature of the original will by the testator, on the two first sides. The last sentence in the will expresses that he has signed the three sides: of this he is perfectly cognizant, and signs the last of the three sides, thereby expressly adopting all the three. I am, therefore, of opinion that the Plaintiff has no right to recover the title-deeds, and that the present action will not lie.

RICHARDSON J. I entirely agree with the rest of the Court, upon both points. Upon the first, I shall merely say that I consider the will to be well executed; because the testator did all that he intended to do at the time of execution. It is quite clear that the testator did not intend to revoke, but only to alter his will; but, supposing that his intention was to revoke, he has not done so according to the direction of the statute of frauds. According to the case of *Sutton* v. *Sutton*, and the other cases, the obliterations and alterations made by this testator would not amount to a revocation of his will. But I think it better to take this case on the broad ground; for all the facts shew that revocation was not the testator's object. He had a fair copy

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made of the original will, as altered; and, therefore, never intended to die intestate. The act of substitution was inchoate and incomplete, and totally inoperative till carried into execution.

Judgment for the Defendants.

LUCKETT v. PLUMMER.

May 28.

In a declaration in debt in *C.B.* a reference to the *clausum fregit* of the writ is not necessary; and an averment, under a *videlicet*, that the Court was sitting on a day in vacation, may be regarded as surplusage.

THE declaration in debt, stated, that the Defendant was summoned to answer the Plaintiff of a plea, that he render to the Plaintiff twenty pounds of lawful money of *Great Britain*, which he owes to and unjustly detains from him, and whereupon the Plaintiff, in his own proper person, complains; for that whereas the Plaintiff, "heretofore, to wit, on the 21st day of *July*, in the first year of the reign of our lord the now king, sued and prosecuted, out of the court of our said lord the now king, of the Bench *here*, the said court being *then* and now at *Westminster*." Venue *Middlesex*. This was demurred to, on the ground, among other objections, that there was no setting out of the *ac etiam* and reference to the *clausum fregit* clause of the writ; and that the Court did not sit on the 21st of *July*, which was a day in vacation.

Taddy Serjt., in support of the demurrer, cited *Estwick* v. *Cooke* (*a*), *Atkinson* v. *Anderson* (*b*), *Harrington* v. *Taylor* (*c*), and 1*st. Wms. Saunders*, 600.

(*a*) *Ld. Raym.* 1557.
(*b*) 3 *T. R.* 184.
(*c*) 15 *East*, 378.

But

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v.
PLUMMER.

But the Court thought that the time being stated under a *videlicet*, was immaterial, and might be rejected as surplusage; that it was sufficient if it appeared in substance that the writ was issued out of the court; and that it was unnecessary to load the declaration with a useless reference to the original *clausum fregit*.

May 28.

YATES and Others *v.* COLE.

Tenants in common may sue in covenant, for neglect of repairs, the lessee of a house, who, subsequently to the demise, but before the breach alleged, becomes a co-tenant of the Plaintiffs in the same house.

COVENANT by lessors of two undivided fourths, and one undivided third of a messuage against lessee for not repairing. Plea among others, that after the demise to the Defendant, and before the breach complained of, one *Bonner*, who was interested in the residue of the premises, bargained and sold his share to the Defendant, whereby the Defendant became tenant in common of the premises with the Plaintiff. Demurrer and joinder, as to this plea.

Onslow Serjt. in support of the demurrer. The question intended to be raised, is, whether one tenant in common, under the circumstances disclosed in the plea, can sue his co-tenant; and from the writ *de reparatione faciendâ*, it appears he can (*a*), even on privity of estate; but here, the Defendant is in by his own act, and is sued on privity of contract. *Co. Lit.* 186. *a.* is an authority to shew, that one joint tenant may lease to his companion, and *Bac. Ab. Lease* I. 5., that one tenant in common may lease to his co-tenant; and in

(*a*) *Co. Lit.* 200. *b.*

Snelgar

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YATES v. COLE.

Snelgar v. *Henston* (*a*) it was decided, that one tenant in common might sue his co-tenant for rent.

Taddy Serjt. *contrà*. The authorities cited do not affect the present case, for the house being an entire thing, and the shares undivided, no action can be maintained against the Defendant for not repairing, his covenant as lessee being merged in his new estate. In the authorities cited, the reversion at the time of suing was in the same hands as at the time of the demise, here it is in different hands at the time of the suit, which circumstance, according to *Webb* v. *Russell* (*b*), and *Stokes* v. *Russell* (*c*), is conclusive against the action.

In the writ *de reparatione faciendâ*, the co-tenant who sues, alleges willingness to perform his part of the repairs, here the Defendant is called on to do the whole.

Per Curiam. The action is properly brought, and there must be

Judgment for the Plaintiff.

(*a*) *Cro. Jac.* 611.
(*b*) 3 *T. R.* 395.
(*c*) 3 *T. R.* 678.

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May 28.

HUDD v. RAVENOR.

In replevin, plea of a former distress for the same rent, without adding that the rent was satisfied, is bad.

REPLEVIN for goods. Cognizance for rent arrear. Plea in bar, that cognizor, on a former occasion, made a distress for the identical rent, and took goods and chattels liable to distress sufficient to discharge the rent in arrear, and the costs and charges of the distress, and of the sale and appraisement thereof, and might have thereby paid the arrears of rent, and the costs and charges of the distress, sale and appraisement, but neglected and omitted to do so, and wrongfully and vexatiously made a second distress for the same rent. Demurrer, for that the plea in bar did not shew, or aver, that the rent was satisfied by the distress alleged. Joinder in demurrer.

Vaughan Serjt., in support of the demurrer, referred to *Lear* v. *Edmonds* (a), and *Lingham* v. *Warren* (b), as in point for the Defendant.

Heywood Serjt. for the Plaintiff. The case of *Lingham* v. *Warren* was decided on the authority of *Lear* v. *Edmonds*, But *Lear* v. *Edmonds* was decided on the principle, that it is necessary to show a satisfaction of the rent, and this principle is no where else to be found, the Court too seem to have thought, that the provision of the statute of 2 *W.* & *M.* is optional, and not compulsory on the distrainer, and it did not appear that the distress had been sold; however, the expression in the statute is not, *may* sell, but *shall and may*; which expression has always been deemed imperative, as ap-

(a) 1 *B.* & *A.* 157. (b) 2 *B* & *B.* 36.

pears

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pears by the *King and Queen* v. *Barlow* (*a*), and all the cases which have been decided on the 8th and 9th *W.* & *M.*, touching the assigning of breaches in actions on bonds. (*b*) In the present plea it is averred, that the goods were liable, the omission of which averment was objected to in *Lear* v. *Edmonds*. But even if it be necessary to aver satisfaction, in answer to an action for use and occupation, (as was the action in *Lear* v. *Edmonds*,) because the party who so sues, has other remedies by which he might have been satisfied, as debt or covenant, yet in replevin, where the Defendant has taken upon himself to recover his rent by his own act, it is quite enough to aver a sufficient seizure, as the party who seizes, is bound to sell under the 2 *W.* & *M.*; this makes a distress a species of prerogative execution, which the Court will watch narrowly; and if a sheriff levies in execution, though he does not sell, that will be a discharge to the Defendant. *Mountenay* v. *Andrews* (*c*), *Atkinson* v. *Atkinson*. (*d*) At common law, the distress operates only as a pledge; and a second pledge cannot be taken, where the landlord has had the benefit of a former one. Indeed the 17 *Car.* 2. *c.* 7 *s.* 4. is a statutory recognition, that the landlord cannot at common law distrain twice for the same rent, *Wallis* v. *Savill.* (*e*) *Moore*, 7., *Cro. El.* 13. anon. *S. C.*, and *Hutchins* v. *Chambers* (*f*), are clear authorities to shew that a landlord cannot split his demand to make two distresses; and there is no difference between splitting the rent and taking two distresses. The vexation and inconvenience to tenants must be very great if such a course is permitted.

(*a*) *Salk.* 609.
(*b*) 2 *Wils.* 377. *Cowp.* 357. 5 *T. R.* 540.
(*c*) *Cro. Eliz.* 237.
(*d*) *Cro. Eliz.* 390.
(*e*) 2 *Lutw.* 1532.
(*f*) 1 *Burr.* 579.

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Hudd v. Ravenor.

Dallas C. J. The only question in this case is, whether the plea is good or bad, and to that I confine my opinion. The objection to the plea is, that it does not shew that the rent was satisfied by the former distress. There are two cases which decide that such a plea is bad. *Lear* v. *Edmonds*, and *Lingham* v. *Warren*, decided on the authority of *Lear* v. *Edmonds*, and the question now is, whether or no *Lear* v. *Edmonds* was improperly decided; in other words, whether three Judges of the Court of King's Bench have misconstrued the statute relating to distresses; in the outset, therefore, we are to say, that three Judges are wrong, and to my mind that is a strong proposition: however, if they are wrong, their decision is open to consideration, and it ceases to be authority if erroneous. But what arguments have been adduced to prove them wrong? The provision in the statute, is, that the party distraining shall and may sell; thence it is argued that he must, and that wherever *shall* is found in company with *may*, it means *must*. That I deny. It does not follow, that a party *must* sell, because he may; if so, it would go to this, that after seizure, a landlord could never come to any terms of agreement with his tenant. But it is clear from what *Abbott* J. says, in *Lear* v. *Edmonds*, that the possession of the goods may be relinquished at the request of the party; and who ever doubted it up to this moment? It does not follow, therefore, that a distress must operate as a satisfaction, because it may be relinquished, and that brings us to the question, whether this plea is sufficient. Now it has been attempted to distinguish this case from the case of *Lear* v. *Edmonds*, because that was an action for use and occupation, but the plea was held bad in that case, because it did not shew that the rent was satisfied, and that is the very defect alleged here. Lord *Ellenborough* says, "the dis-

distress may enure as a satisfaction, or may constitute an injury: if the former, then the Defendant ought to have pleaded those circumstances, which would make it operate as a satisfaction; for it is incomplete as satisfaction by the mere act of seizure." And so it is incomplete here. *Bayley* J. says, "it was the duty of the Defendant to set out the whole of his case;" and so it was here: he might have stated the whole of his case in the plea: the words "neglected and omitted," are not sufficient; if the distress had operated as a satisfaction, it ought to have been so stated. I should have entertained no doubt on the subject, even if no case had been before decided.

PARK J. I see nothing in the Plaintiff's argument to induce the Court to think that the two former decisions are wrong. Much stress has been laid on the supposed inconvenience to tenants, but the inconvenience is all the other way, and if the landlord must proceed to sell, the Plaintiff should have shewn that he was satisfied; for there are many cases supposable, in which the distress may be no satisfaction to the landlord, as where he withdraws it, relying on the tenant's word. I do not agree that *shall and may* in a statute are always imperative; they must be deemed imperative or not, according to the subject matter. The statute of *William* and *Mary* is a remedial law, and it was never meant, that the landlord must necessarily sell, because he has the power to do so. It certainly is not allowable for a landlord to split his rent, and purposely take two distresses, but Lord *Mansfield* says, it is convenient he should come a second time, if the first distress is not sufficient, otherwise he might be tempted to secure himself by taking an exorbitant distress in the first instance. I think, therefore, that the present plea is not sufficient.

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BURROUGH J. We must over-rule the two preceding decisions, if we say that this plea is sufficient. But it contains no averment on which issue can be taken, though it might easily have done so: as if it had said, that the Defendant wrongfully destroyed the distress. It rests therefore, on the same ground as the former cases, which in my judgment were well decided, and the present plea is bad for want of shewing that the rent was satisfied.

RICHARDSON J. I think the plea insufficient. For any thing that appears, the former distress may have been relinquished in kindness to the tenant, and I do not think any issue could have been taken on the words *neglected and omitted*. I am not satisfied that the statute of *W.* & *M.* is imperative as to a sale, though it is not necessary to pronounce an opinion on that point; but supposing it is so, that statute never meant to preclude parties from ending the proceeding by an agreement. The principle of the former cases is the same as the present, and there must be

Judgment for the Cognizor.

1821.

GRAY and Another *v.* BOND and Another.

May 28.

Where the lessees of a fishery had publickly landed their nets on the shore at *A.* for more than 20 years, and had, at various times, dressed and improved the landing place (both the fishery and the landing place having originally belonged to one person, but no evidence being offered to shew that he, or those who under him owned the shore at *A.*, knew of the landing nets by the lessees of the fishery): Held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at *A.*

THIS was an action on the case, for disturbing the Plaintiffs in the enjoyment of their right of drawing nets to land, on the banks of the river *Derwent*, wherein they had a fishery. The Defendants pleaded the general issue, and at the trial before *Bayley* J., at the *York* Spring assizes, 1820, a verdict was found for the Plaintiffs, subject to the opinion of the Court, upon the following case.

The river *Derwent* is a public navigable river in the county of *York*, the tide whereof flows to a point higher up the river than the place mentioned in the declaration called the *Crabtree Fellings*. This river forms the boundary of the manor of *Elvington*, which extends to the line of the stream, and the lord of that manor, from time immemorial, hath been seised of a fishery in the river on the *Elvington* side of the river, to the line of the stream thereof, and extending throughout the length of the manor which he claims, as appurtenant to the manor. Before, and at the time of the execution of the lease and release hereinafter mentioned, *Richard Sterne* was seised in his demesne as of fee of the manor of *Elvington*, and of the lands conveyed by the deed, as well as other lands within the manor, and adjacent to the river *Derwent*, and being so seised, by indenture of lease and release, dated the 3d and 4th *October*, 1774, he conveyed to *Ralph* and *John Dodsworth* (among other things) the close of land upon which the felling called the *Crabtree* felling is situated. The Plaintiffs are possessed for a term of years of the legal estate of and in the manor and fishery; and, at the time of the grievance com-

 plained

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plained of in the declaration, were in possession of the fishery. It was proved at the trial, that the owners of the fishery and their lessees, had, for above twenty years last past, and in the recollection of one witness, at the distance of 64 years ago, for the more convenient use and enjoyment of their said fishery, drawn and pulled their nets to and upon the bank of the river, at certain different parts thereof, on the *Elvington* side of the river, for the purpose of taking the fish out of the nets, and that they had occasionally dressed the landing places, by sloping the foreshore, and levelling the ground with a spade. These landing places are called pulls or fellings, and are thirteen in number, within the manor of *Elvington*. The other fellings are situate upon different closes, which, before the time of the said conveyance, were and still are the property of the lord of the manor of *Elvington*; but the felling in question, called the *Crabtree* felling, is situate upon one of the closes which were conveyed to *Ralph* and *John Dodsworth*, by the before-mentioned deeds of lease and release, under whom Mr. *Preston*, the present proprietor of the closes, now claims and is seised of the same. There was no evidence either way, whether *Ralph* or *John Dodsworth*, or any person under whom Mr. *Preston* claims, or Mr. *Preston* himself had any knowledge of or was privy to the said use of the *Crabtree* felling. The Defendants, as the servants of Mr. *Preston*, and by his direction, before the commencement of this action, placed stakes in and upon the *Crabtree* felling, so as thereby to prevent the Plaintiffs from pulling their nets to land, and using the said felling so conveniently as before.

It was objected by the Defendants at the trial, that, as the land upon which this felling was situated, had been conveyed by the owner of the fishery to the *Dodsworths* in 1774, without any reservation or any exception of

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of the right of landing nets upon the said felling, such right was entirely gone. The learned Judge left it to the jury to presume, from the evidence of enjoyment, a grant of the right to land nets upon the *Crabtree* felling, to the owners of the said fishery, by some former owner of the close whereupon it was situated, since the year 1774; and the jury thereupon found a verdict for the Plaintiffs, damages 1*s.*

The question for the opinion of the Court was, whether the direction of the learned Judge was right. If the learned Judge ought to have directed the jury to presume such grant, then the said verdict was to stand; but if not, then a nonsuit was to be entered.

The case was argued on a former day in this term.

Bosanquet Serjt., for the Plaintiffs, contended, that it was properly left to the jury to presume, from the evidence of enjoyment, a grant of the right to land nets upon the *locus in quo*, and cited *Campbell* v. *Wilson* (*a*), *Yard* v. *Ford* (*b*), *Keymer* v. *Summers.* (*c*)

Hullock Serjt., for the Defendants. The cases cited for the Plaintiffs do not apply. Mere lapse of time will not of itself raise against the owner the presumption of a grant. In *Campbell* v. *Wilson* there was a notorious user for twenty years exercised adversely. And so, in all the cases collected by Serjeant *Williams* in *Yard* v. *Ford*, particularly *Darwin* v. *Upton*, the grounds for such a presumption were infinitely greater than in the present case. One of the general grounds of a presumption, is the existence of a state of things which may reasonably be accounted for, by supposing

(*a*) 3 *East*, 294.
(*b*) 2 *Wms. Saund.* 175. *b.*
(*c*) *Bull. N. P.* 74.

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the matter presumed. (*a*) Here, none of the parties interested were aware of the practice which obtained with respect to the landing of the nets upon the particular spot. Though an uninterrupted possession for twenty years and upwards, be a bar in an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient, otherwise he might collude, to the great inconvenience of his landlord. *Daniel* v. *North.* (*b*) The grounds for presuming the surrender of terms, are laid with equal tenderness to the interests of the owner of the inheritance, and shew the jealousy with which the law sanctions a presumption. *Doe* v. *Wright* (*c*), *Doe* v. *Hilder.* (*d*) The distinction between this case and those cited for the Plaintiffs is, that, in the latter, knowledge on the part of the person interested was presumed upon clear grounds. There is no such khowledge in evidence in this case, which completely falls within the reasoning of Lord *Ellenborough*, in *Daniel* v. *North*, and the rule there laid down by him and the rest of the Court.

Bosanquet, in reply, was stopped by the Court.

DALLAS C. J I think the question was properly left to the jury to presume or not, from the facts before them, a right on the part of the Plaintiffs to land their nets on the *locus in quo*, and a grant from some former owner of the soil. We are not now called on to decide

(*a*) *Per Abbott* C. J., in *Doe* v. *Hilder*, 2 *B.* & *A.* 791.
(*b*) 11 *East*, 372.
(*c*) 2 *B.* & *A.* 719, 720.
(*d*) *Ibid.* 782.

whether

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whether the jury were right or wrong in the conclusion to which they have come (though had I been one of them I should probably have come to the same), but the question is, whether the learned Judge left it to them properly, to presume a former grant. I agree with the argument which has been urged on the part of the Defendants, that mere lapse of time will not of itself raise against the owner the presumption of a grant. When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts; and here, where there is no direct evidence whether or not the owner of the land had any knowledge of what passed, the inference to be drawn must, in a peculiar degree, depend on the nature of the accompanying facts; and the presumption in favour of a grant will be more or less probable, as it may be more or less probable that those facts could not have existed without the consent of the owner of the land. The circumstances proved in the present case, were sufficient to leave to a jury, as circumstances from which the knowledge of the owner, and his acquiescence, on the supposition of a preceding grant, might fairly be presumed. This was done; and how could it be inferred that the owner had not such knowledge, when he was proved to be in possession of the property, when the landings were all made publicly, and the soil had actually been levelled to facilitate the Plaintiffs' access. I entertain no doubt, that the question was properly left to the jury.

PARK J. It seems to me, that it was most fitly left to the jury in this case, to presume a grant. Notwithstanding the distinction which has been attempted, I cannot distinguish this case from that of *Campbell* v. *Wilson*, at *Lancaster*, and if ever there was a strong case, that was one, because there had been an award and an inclosure, twenty-six years before. The circumstances

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in that case, from which the knowledge of the owner of the soil might be inferred, were not stronger than those in the present. The case, indeed, does not come up to that of *Daniel* v. *North*, because there was something in the nature of the easement there which makes a difference. A landlord may not see windows thrown out, and a tenant may not feel the inconvenience; and this distinction is referred to by *Le Blanc* J. But in the present case, there is reasonable ground to presume the knowledge of the land-owner, and the question was properly left to the jury.

BURROUGH J. Every case of this sort depends on its own circumstances, and the circumstances here place the point in a very clear light. Every act done by the Plaintiffs for 46 years, on the *locus in quo*, would have been a trespass, if they had not a right of landing there; but from 1774 to the present time, all these acts have been done openly: and the only question is, whether there were any facts from which a Judge could leave it to a jury to presume a grant of the right in question. Undoubtedly, the circumstances were such as could scarcely have occurred without the knowledge of the owner.

RICHARDSON J. This is not like a case of injuries arising to an owner from the collusion of his tenant; the question is, whether or no Mr. *Preston* had knowledge of what was taking place on his land; and I think the case was properly left to the jury.

Judgment for the Plaintiffs.

GEORGE PALMER, WILLIAM LOADEN, and Others, *v.* ANN BATE, WILLIAM BATE, THOMAS WRIGHT VAUGHAN, and Others.

May 31.

An assignment to trustees of all the emoluments and profits which, during the life of *A.* and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, *after deducting the salary or allowance of his deputy for the time being*, upon trust, to pay the interest arising on certain debts due from *A.*, and from time to time render the surplus and residue, after satisfying the trusts to *A.*, is invalid.

HIS honour the vice-chancellor, by decree made on the hearing of this cause, on the 3d *June*, 1820, ordered a case, of which the following is the substance, to be stated for the opinion of this Court. The Defendant, *Vaughan*, who is clerk of the peace for the city and liberty of *Westminster*, which office he has held since the year 1802, under the *custos rotulorum* of the city, liberty, and county, and from the time of his appointment, has executed the office by his deputy *Lorenzo Stable*, an attorney residing within the liberty, by indenture, dated the 25th *January*, 1806, assigned to *George Palmer* and *William Loaden*, their executors, administrators, and assigns, "All and singular the income, emoluments, produce and profits whatsoever, which, during the life of him, the said *Thomas Wright Vaughan*, and his continuing to hold the said place, or office of clerk of the peace for *Westminster*, should arise or become due, or payable to him, the said *Thomas Wright Vaughan*, as clerk of the peace for *Westminster*, or otherwise by reason, or in respect of his said place or office, and all arrears thereof, then due, *after deducting the salary or allowance of the deputy for the time being, of him*, the said *Thomas Wright Vaughan*, in the said office, and all other expences attending the execution of the said office. To hold, receive and take the said income, emoluments, produce and profits, of all and singular other the premises thereby assigned, thenceforth

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unto the said *George Palmer* and *William Loaden*, their executors, administrators, and assigns, upon trust, that the said *George Palmer* and *William Loaden*, and the survivor of them, his executors, administrators, and assigns, should in the first place, by and out of the same, retain and deduct, and reimburse themselves, and himself, certain costs and expences therein particularly mentioned, and all such costs, charges, and expences, as they, or any of them should have incurred, or become liable to pay, in or about the execution of the aforesaid trust. And should, and would in the next place, pay and apply the same in, or towards payment and discharge of the interest, which from time to time should become due, or owing to *Thomas Baylis* and *Samuel Ridge*, respectively," on certain debts, due from *T. W. Vaughan* to *Baylis* and *Ridge*, according to the true intent and meaning of a covenant contained in the indenture. "And should from time to time render and pay all *the surplus* and residue of the said income, emoluments, produce and profits, which should from time to time remain, after answering and satisfying the trusts and purposes aforesaid, unto the said *Thomas Wright Vaughan*, his executors, administrators, or assigns, for his or their proper use and benefit."

The Defendant, by the same deed, constituted the trustees, his attornies, to demand, recover and receive the said income, emoluments and profits, and to give receipts and discharges for the same; and covenanted, that neither he, his executors or administrators, would at any time thereafter, by himself or themselves, or by any agent or agents, receive or take into his or their possession, the said income, emoluments, produce and profits, or any part thereof, or revoke, or make void, the powers and authorities thereinbefore contained.

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The questions for the opinion of the Court were,

Whether the assignment of the income, emoluments, produce and profits of the office, or place of clerk of the peace for *Westminster*, after deducting the salary or allowance of the deputy for the time being, of the Defendant *Thomas Wright Vaughan*, in the said office, by the said Defendant, *Thomas Wright Vaughan*, to the Plaintiffs, *George Palmer* and *William Loaden*, by the indenture in the pleadings mentioned, dated the 25th *January*, 1806, is a good and effectual assignment, and valid in the law? And whether the said *George Palmer* and *William Loaden* could legally and of right receive and take the income, profits, emoluments, and produce of the said place or office, under, and according to the true intent, meaning and effect of the said deed of assignment, upon, and subject to the trusts, intents and purposes therein expressed and declared of and concerning the same?

The case was argued on a former day in this term.

Lawes Serjt., for the Plaintiffs. There is no authority immediately applicable to this case: the decisions regard offices of a different nature. It is not contended that the office is saleable; it is a public office relative to the administration of justice, and the sale of it would be illegal by stat. 5 & 6 *E.* 6. (*a*) But this is merely an assignment of the profits of an office which is regulated by stats. 37 *H.* 8. (*b*) and 1 *W.* & *M.* (*c*) By the former, the nomination of clerks of the peace is given to the *custos rotulorum*; by the latter, a residence in the county is required; and, by both, it is enacted, that the office may be executed by deputy, to be approved of by the *custos rotulorum*. That the office is a freehold appears from *The*

(*a*) c. 16. (*b*) c. 1. s. 3. (*c*) c. 21. s. 5.

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Queen against The Clerk of the Peace of Cumberland (a), and *The King and Queen against Evans* (b); so much so that the succeeding *custos rotulorum* cannot displace the actual clerk. *Harcourt* v. *Fox.* (c) Where profits are annexed to a freehold office, it cannot be said that the officer has not the disposal of them. Nor will public justice suffer from the assignment of them; the fulfilment of the duties of the office by deputy being provided for. *Godolphin* v. *Tudor* (d) recognizes the right of the principal to dispose of the profits of a public office, and *Stuart* v. *Tucker* (e) shews that the use of the half pay of a military officer is assignable. A close analogy may be found in the assignment of the profits of ecclesiastical benefices; the only requisite in such cases is, that the cure be provided for, as the execution of the office is in the present case. [*Dallas* C. J. Suppose the deputy dies, and the *custos rotulorum* refuses to approve the nomination of a new deputy, what becomes of the performance of the duties of the office? Again, suppose that the deputy becomes ill, the principal must then perform the duties of the office, but how is he to perform those duties when there is nothing to sustain him? *Park* J. The case of *Stuart* v. *Tucker* was much shaken by subsequent decisions. In *Barwick* v. *Reade* (f) it was held, that the full pay of a military officer could not be assigned by way of annuity; and in *Arbuckle* v. *Cowtan* (g), Lord *Alvanley* C. J., in delivering judgment, says, "It is now clearly established, that the half-pay of an officer is not assignable, and unquestionably any

(a) 11 *Mod.* 80.
(b) 12 *Mod.* 13.
(c) 12 *Mod.* 42.
(d) 1 *Salk.* 468.
(e) 2 *W. Bl.* 1137.
(f) 1 *H. Bl.* 627.
(g) 3 *B. & P.* 321.

salary,

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salary, paid for the performance of a public duty, ought not to be perverted to other uses than those for which it is intended. Notwithstanding the case of *Stuart* v. *Tucker*, in which it was held that the half-pay of an officer was assignable in equity, it was expressly decided, in *Flarty* v. *Odlum*, that it was not assignable at all, which decision met with general approbation."]

Lens Serjt., *contrà*. It is admitted, that the office in question is not saleable; if, then, the officer cannot sell, can it be contended that he may pledge his office for any amount? The argument drawn from the provision for the deputy is beside the question. The principal cannot withdraw himself, otherwise there might be a hindrance of public justice. In the present case, the office is substantially no longer in the officer, but in those to whom he assigns the produce of it. Supposing the deputy to fail, there would be no one to perform the duties of the office. A military officer cannot assign his half-pay. (*a*) And the analogy drawn from cases of sequestration does not assist the Plaintiff. Those cases turn on the old law of lay-fee. On suggestion that the clergyman has no lay-fee, the bishop levies, providing for the cure by appointing a curate and paying him out of the proceeds of the execution. The case of *Godolphin* v. *Tudor* is not in point. The officer here is the mere nominal possessor, and, substantially, has sold his office. *Blackford* v. *Preston* (*b*), *Parsons* v. *Thompson* (*c*), and *Osborne* v. *Williams* (*d*), shew in what light contracts of this nature are viewed both at law and in equity. In *Harrington* v.

(*a*) *Flarty* v. *Odlum*, 3 *T. R.* 681.
(*b*) 8 *T. R.* 89.
(*c*) 1 *H. Bl.* 322.
(*d*) 18 *Ves.* 379

Kloprogge

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Kloprogge (a), the office, the profits of which the Court held might be well assigned, was only that of *private* secretary to Lord *Holdernesse*.

(a) The Reporters are indebted to the kindness of Mr. Serjeant *Lens* for the following MS. note of the case.

(K. B. *Michaelmas*, 25 *Geo.* 3)

HARRINGTON *v.* KLOPROGGE.

An assignment of the profits of all the offices of trust commissions, &c. which the Defendant may acquire is good, as to all offices which may be legally assigned, by way of indemnifying the Plaintiff, who has paid money for the Defendant.

ACTION on bond for payment of 1200*l.*; oyer craved, and the condition appeared to be, that the Plaintiff had joined in a bond with the Defendant, to one *Newman*, for 1200*l.*, to secure the payment of an annuity of 100*l.* to *Newman*, during the life of the Defendant. That the money given for the annuity had been paid to the present Defendant, and in order to indemnify the Plaintiff against the consequence of becoming security, it was agreed, that the profits of the place of the Defendant, as secretary to Lord *Holdernesse*, should be assigned, and that, whenever the Defendant should become possessed of any office of trust, commission, place or pension whatever, he should assign such office, &c. to the Plaintiff, who was to take the whole profits: and for the performance of this agreement, the present bond was given. The plea then averred, that the Defendant, since the bond, had been private secretary to Lord *Holdernesse*: and that all the money received by him in that place, was paid by the Defendant to the Plaintiff, and that Defendant never had any other place.

Replication denied the receipt of the money as stated in the plea; and alleged, that Plaintiff had been obliged to pay *Newman* a certain sum.

Demurrer by Defendant, and issue on the payment.

Morgan, for the Defendant, made two objections to the validity of the agreement. First, that it was illegal and void by stat. being for the purpose of assigning all offices, &c.; and that to assign an office of trust was illegal. Second, that, by the common law, offices of trust could not be assigned.

Lord *Mansfield*, without hearing the other side; there is nothing in the objection. The agreement is for the assignment of all offices, and is good *as to all offices which may legally be assigned*. The profits arising from this office *of private secretary* to Lord *Holdernesse* might be assigned; and as to all others, they are not within the present case.

Judgment for Plaintiff.

See 3 *Co.* 83. *a.*

Lawes,

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Lawes, in reply. *Godolphin* v. *Tudor* decides, that an officer has a right to dispose of the profits of his office. If an officer may dispose of the profits to his deputy, he may, also, assign them to his creditors.

Cur. adv. vult.

The following certificate was now sent:

This case has been argued before us by counsel. We have considered it, and are of opinion, that the assignment of the income, emoluments, produce, and profits of the office or place of clerk of the peace for *Westminster*, after deducting the salary or allowance of the deputy for the time being, of the Defendant, *Thomas Wright Vaughan*, in the said office by the said Defendant, *Thomas Wright Vaughan*, to the Plaintiffs, *George Palmer* and *William Loaden*, by the indenture in the pleadings mentioned, dated the 25th day of *January*, 1806, is not a good or effectual assignment, nor valid in the law.

And that the said *George Palmer* and *William Loaden* are not entitled legally and of right to receive and take the income, profits, and emoluments, and produce of the said place or office, under and according to the true intent, meaning, and effect of the said deed of assignment, upon and subject to the trusts, intents, and purposes therein expressed and declared of and concerning the same.

R. DALLAS.
J. A. PARK.
J. BURROUGH.
May 31st, 1821. J. RICHARDSON. (*a*)

(*a*) See also *Hanington* v. *Du Chatel*, 1 *Bro. C. C.* 124. *Lidderdale* v. *Duke of Montrose*, 4 *T. R.* 428. *Garforth* v. *Fearon*, 1 *H. Bl.* 327. *Lowfield*'s case and *Bristow*'s case, 1 *Atk.* 212.

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June 1.

Tomlinson v. Day.

A lessee took a farm under an agreement, which he never signed, and the terms of which his lessor, in a material point, failed to fulfil. In an action for the use and occupation of the farm, Held, that the jury might ascertain the value of the land, without regarding the amount of rent reserved by the agreement.

THE Defendant took a mansion-house and farm of the Plaintiff, under an agreement, by which the Plaintiff agreed, among other things, that the Defendant should have the exclusive right of sporting over the manor within which the farm lay, and should occupy the glebe land of the parish. The rent to be paid was 450*l.* This agreement, though acknowledged and recognised, was never signed by the Defendant; but he occupied the farm for some time. The Defendant's chief inducement to take the farm was the promised privilege of an exclusive right to sport; but it turned out that the Plaintiff (not being the owner of all the lands in the manor, nor having free warren) had no power to grant any such privilege, and the Defendant was in fact warned off by the several occupiers within the manor. The Plaintiff also failed in procuring the glebe for the Defendant's occupation, and for this he offered to make a proportionate abatement of the rent. The Defendant, being sued in an action for use and occupation, for 450*l.*, one year's rent, as reserved by the agreement, paid 350*l.* into Court, and proved the foregoing facts at the trial before *Dallas* C. J., at the *London* sittings after last *Hilary* term, when the jury found a verdict for the Defendant, considering 350*l.* to be the annual value of the land, independently of the glebe and the privilege of sporting.

Vaughan Serjt., on a former day, obtained a rule *nisi* for a new trial, on the ground that the agreement, though not signed, having been acknowledged by the Defendant's occupying the land, he must be bound by it as to the *quantum* of rent, under the 11 *Geo.* 2. *c.* 19. *s.* 14.; that the value of the land being ascertained by the

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the rent reserved in the agreement, the jury were not at liberty to find any other value; and that, with respect to the Plaintiff's failure to procure the exclusive privilege of sporting, the Defendant might obtain redress in a cross-action.

Pell Serjt., in shewing cause against the rule, contended, that as the Defendant never signed the agreement, nor had ever attained under it the chief object which he proposed to attain, the agreement must be considered a nullity as far as regarded him; and then, the Plaintiff being entitled to sue for nothing but the unascertained value of the land, the jury were at liberty to ascertain and decide what that value was.

Taddy and *Vaughan* Serjts., in support of the rule, argued that the Defendant was bound by the agreement, though he never signed it, because he had taken a benefit under it (*a*): if so, the action being on the agreement, the jury could not travel out of it; and the failure to afford the sporting privilege was no bar to the action, because it did not go to the whole consideration.

The *Court* were of opinion, that an agreement between lessor and lessee was only evidence of the amount of rent to be paid, where the lessee had enjoyed under such agreement; that the lessor in the present instance, having failed to fulfil the agreement in the chief object which had induced the lessee to propose becoming a party to it, the lessee could scarcely be said so to have enjoyed; but that, at all events, the Defendant in an action for use and occupation, as in an action of debt for rent, might shew an eviction of the whole or of part; that, in case of an

(*a*) *Co. Litt.* 231. *a.*

eviction

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eviction of part, the jury must ascertain, independently of any agreement, what the Defendant ought to pay; and that an eviction of part of the subject-matter of the demise (namely, of the exclusive privilege of sporting) having been clearly proved in the present instance, the rule for a new trial must be

Discharged.

June 2.

WILLIAM DUNCAN *v.* SAMUEL HILL, RICHARD HILL, HENRY WRIGHT, and GEORGE BOLTON MAINWARING.

The Plaintiff declared on three bills of exchange, in three several counts; but, according to his particular, only sought to recover on the bill set forth in the first count. The defence being, that the Defendants were not partners when the bill set forth in the first count was drawn, the Plaintiff tendered in evidence the other two bills, for the [illegible] establishing the fact of the partnership: the evidence having been rej[illegible] he ground that these bills were not included in the particular, the Court gran[illegible] w trial.

IN this case, which was tried before *Dallas* C. J., at the *London* sittings after *Hilary* term, a verdict having been found for the Defendants,

Lens Serjt., on a former day, obtained a rule *nisi* for a new trial, on the ground that admissible evidence had been excluded.

Taddy and *Lawes* Serjts. having subsequently shown cause against the rule,

DALLAS C. J. now delivered the judgment of the Court. (*a*) This is an action on three several bills of exchange, each being the subject of a distinct and separate count. The first count was on a bill for 1200*l.*; the third [illegible] on a bill for 403*l.* 6*s.* 6*d.*; and the fifth count on a bill for 407*l.* 17*s.* 9*d.* The Defendants

(*a*) The facts of the case, and the arguments on both sides, are so sufficiently stated in the judgment that it was deemed unnecessary to repeat them.

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ants applied for a particular of the Plaintiff's demand, which particular was in these words: "This action is brought to recover principal and interest, and expences due for, and in respect of, the bill of exchange in the first count of the declaration mentioned, and the Plaintiff will avail himself of all the counts of the declaration for recovery thereof." On the trial of the cause, the two *Hills* having suffered judgment by default, and the two Defendants, *Wright* and *Mainwaring*, having pleaded the general issue, after the evidence had been given as to the first bill, the Plaintiff offered in proof the two other bills, which were objected to by the Defendants. No evidence was offered to connect the two last bills with the first, as given in payment of a sum remaining due on that bill, or as connected with it in any way whatever, except as after mentioned; and, with the exception of the two *Hills*, who were the drawers of the first bill, and the acceptors of the two latter, the parties were different on the face of the bills. But the purpose for which it is said they were offered in evidence was this: The defence set up was, that *Wright* and *Mainwaring*, who had originally been partners in the stone pipe company, on whose account these bills were stated to have been drawn, had ceased to be so, or were not proved to be such, when the first bill was drawn; and that *Samuel Hill* and Co. was the firm of the house of the two *Hills*, carrying on, as wine merchants, a separate trade, to which character these bills might be referred; and, to rebut this defence, these two bills are alleged to have been offered in evidence, to shew a continuation of the partnership at and subsequent to the time when the first bill for 1200*l.* was drawn, the two latter bills being of a subsequent date, and dated at the same place with the former bill, where the business of the stone pipe company was carried on.

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It has been stated, on the part of the Defendants, that the two bills were only offered in evidence in support of the counts, in which they are stated as substantive causes of action; and it is agreed on both sides, that, if so offered, they were properly excluded. But the fact has been correctly stated on the part of the Plaintiff, namely, that they were offered as auxiliary evidence only, and in the manner I have stated; and it is equally true that, so offered, I did not receive them, considering them as excluded by the particular, and therefore objected to by the Defendants.

I thought that the Plaintiff, having expressly declared on three bills, but, by his particular, having confined his right to recover to one bill only, the Defendants had no reason to apprehend that the two bills would be given collaterally in proof, under the general notice; but that, by all the other counts, was to be understood the common counts, as in the usual way. Supposing no counts had been on the two bills specifically, I should have had no doubt that they might be received as auxiliary evidence, under the common counts; but the peculiarity consisted in their having been originally declared on as distinct and substantive causes of action, and, by the particular, abandoned as such.

My Brothers, however, are of opinion, that, under this particular, the Plaintiff had a right so to apply the two bills; and with this opinion, on final consideration, I agree; and the more especially for this reason, that it appears to me that I ought, at all events, to have received the bills in evidence. If admitted, and they had weighed nothing, they would then have left the case where it was; and, if they had weighed any thing, the Defendants might have moved the Court, as may be done in such a case, on an affidavit, stating that they had been misled by the particular, as framed, in which case

 the

the sufficiency of the particular would have been before the Court; and, if at all doubtful, the Defendants would have been let in to try. But, taking the other way, were a Plaintiff to be shut out by a strict construction, he might be concluded by a particular fairly meant, but doubtfully worded, against the justice of his case. At any rate, there can be no mistake, nor any surprise on the Defendants in future; as, what has passed, and is now passing, will operate as the fullest notice how the bills are to be applied.

I have said this much in a case that would not have required it, if there had not been a difference of assertion, with respect to facts, at the bar; and, therefore, with a view to a future trial, it is important that the parties should clearly know what is understood to have passed on the former occasion, and on what ground a new trial is now granted.

Rule absolute.

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June 4.

A. was seised of an estate for life; remainder to his sons, *B.*, *C.*, *D.* and *E.*, in tail, in such shares and proportions as *A.* should appoint by will. In 1807, *A.*, *B.*, *C.* and *D.*, conveyed the entirety of the premises to make a tenant to the *præcipe*, so that one or more recoveries should be suffered, in which *A.*, *B.*, *C.*, *D.* and *E.* should be vouchees, for the purpose of barring all estates tail: a recovery was then suffered, in which *B.* and *C.* were vouched. In 1809, *A.*, *B.*, *C.*, *D.*, and *E.* conveyed all the premises to make a tenant to the *præcipe*, in a recovery which was suffered in 1810, in which *E.* was vouched; and, in 1811, a recovery was suffered, in which *D.* was vouched.

Held, that by these conveyances and recoveries the estates tail in *B.*, *C.*, *D.*, and *E.* were well barred.

THIS was an action of *assumpsit* to recover the purchase-money of an estate sold by the Plaintiff to the Defendant, which action was defended on the ground of a defect in the title. The cause was tried at the sit-

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tings after last *Michaelmas* term, at *Westminster*, before *Dallas* C. J., when a verdict was found for the Plaintiff, subject to the opinion of the Court, on a case in substance as follows.

Devise to *Daniel Collyer* for life, remainder to trustees to preserve, &c.; remainder to the son and sons of *Daniel Collyer*, lawfully to be begotten, in such shares and proportions as he should appoint by will, and the heirs of their respective bodies; remainder to the daughters of *Daniel Collyer*, as tenants in common in tail; remainder to *Charles Collyer*, for life, with divers remainders over. The devisor died, leaving *Daniel* and *Charles Collyer* him surviving.

Daniel had issue four sons, *Daniel*, *John Bedingfield*, *William*, and *George*. By indentures of lease and release, of 9th and 10th of *February*, 1807, *Daniel* the elder, *Daniel* the younger, *John B.*, and *William*, for the purpose of barring all estates tail, conveyed the entirety of the premises to *George Kinderley*, as tenant to the *præcipe*, *so that one or more common recovery or recoveries* thereof should be suffered, in which *George Kinderley* should be tenant, *William Domville* demandant, and *Daniel Collyer* the elder, *Daniel* the younger, *John B.*, *William* and *George*, should be vouchees, who should vouch over the common vouchee; and then followed a declaration of the uses of the recovery. A recovery of the entirety of the premises was suffered, according to the above deeds, in *Hilary* term, 47 *Geo.* 3., in which *Domville* was demandant, *Kinderley* tenant, and *Daniel Collyer* the younger, and *John B.*, vouchees. By indentures of lease and release, of the 3d and 4th *November*, 1809, *Daniel Collyer* the elder, *Daniel* the younger, *John B.*; *William*, and *George*, for barring all estates tail, and for extinguishing the power of appointment vested in *Daniel Collyer* the elder, did, according to their respective estates and interests, convey to *George Kinderley*, all the premises

mises that he might become tenant to the *præcipe* in one or more recoveries in which the said *George Kinderley* should be tenant, *William Domville* demandant, *Daniel Collyer* the younger, *John B.*, *William* and *George*, vouchees, who should vouch the common vouchee, which recovery should enure to the same uses and purposes as were set forth in the deeds of 1807. In pursuance of these latter deeds, a recovery was suffered in *Hilary* term 50 *Geo.* 3., in which *Domville* was demandant, *Kinderley* tenant, and *George Collyer* vouchee, who vouched the common vouchee, of the entirety of the premises comprised in the recovery of *Hilary* term, 47 *Geo.* 3. A recovery was also suffered in *Michaelmas* term, 51 *Geo.* 3., in which *Domville* was demandant, *Kinderley* tenant, and *William Collyer* vouchee, who vouched the common vouchee, of the entirety of the premises comprised in the recovery of *Hilary*, 47 *Geo.* 3. *Daniel Collyer* died without executing the power of appointment limited to him by the will. The question for the opinion of the Court was, whether, by the several deeds of the 9th and 10th *February*, 1807, and the 3d and 4th *November*, 1809, and the recoveries suffered in *Hilary* term, 47 *Geo.* 3., *Hilary* term, 50 *Geo.* 3, and *Michaelmas* term, 51 *Geo.* 3., the estates tail of the four sons of *Daniel Collyer*, the devisee for life, and the remainders over created by that will, were effectually barred. If the Court should be of opinion that they were so barred, then the verdict found for the Plaintiff was to stand; but if the Court should be of opinion that they were not effectually barred, a verdict was to be entered for the Defendant.

The case was argued on a former day in this term.

Bosanquet Serjt. The objection to this title is, that the entirety of the estate in question having passed out

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of the tenant to the *præcipe* by the two first recoveries, the tenant to the *præcipe* in the last recovery had no estate at all; and so that recovery was void, and the estates tail not sufficiently barred. But a recovery is only a contrivance of law, to enable a tenant in tail to convey what he could not otherwise convey, and, beyond what is necessary for effecting such a purpose, the Court will not apply to a recovery all the strict rules which govern real actions in other cases. This doctrine is laid down by Lord *Kenyon*, in *Doe*, *dem. Crow*, v. *Baldwere* (*a*), by *Lee* C. J. in *Martin* v. *Strachan* (*b*), and in *Pigott.* (*c*) If several are joint tenants in tail and one is vouched, the recovery will operate on the share to which he is entitled, and not on the interest of the others. *Marquis of Winchester*'s case. (*d*) *Iseham* v. *Morrice.* (*e*) *Com. Dig. Estate*, K. 8., *Pigott*, 109. So that *William*'s interest did not pass out of the tenant to the *præcipe* on the two first recoveries; and where a conveyance consists of various parts, of which a recovery or recoveries form one, and the various parts are complete at different times, the Court will consider the whole conveyance as one assurance, and support it accordingly. *Cromwell's case.* (*f*) *Dowman's case.* (*g*) *Havergill* v. *Hare.* (*h*) *Doe, dem. Odiarne*, v. *Whitehead.* (*i*) *Lord Anglesey* v. *Lord Altham.* (*k*) Unless the law were so, the conveyance by the wife in the last case would have conveyed no estate, and the fine would have been inoperative, for the same reason as the recovery is contended to be inoperative in the present instance.

(*a*) 5 *T. R.* 112.
(*b*) *Ibid.* in notis.
(*c*) *p.* 26., ed. 1739.
(*d*) 3 *Rep.* 1.
(*e*) *Cro. Car.* 109.
(*f*) 2 *Rep.* 69.
(*g*) 9 *Rep.* 8.
(*h*) 3 *Bulst.* 256.
(*i*) 2 *Burr.* 710.
(*k*) *Salk.* 676.

Lens

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Lens Serjt. *contrà*. The principles laid down and the cases cited on the other side, may all be admitted, but they do not apply to the present case, which is not the case of one conveyance consisting of various parts: but the last recovery is of itself a separate and distinct conveyance, and intended to be so: and then the previous recoveries having prevented the possibility of there being any estate in the last tenant to the *præcipe*, this is an ineffectual attempt to complete what was intended. The doctrine that a recovery can affect only the estates of those who are vouched, may apply where several parties have each a separate fractional interest, but that is not the case here. (*Seymor*'s case (*a*) was cited.)

Bosanquet, in reply, contended, that the doctrine applied equally to the present case.

DALLAS C. J. This was an action of assumpsit, brought upon a contract for sale of an estate, which was defended on the ground of a defect in the Plaintiff's title. On the trial, a verdict was found for the Plaintiff, subject to a special case. (Here his Lordship stated the substance of the case.) The objection to the title, which has been insisted upon in the argument on behalf of the Defendant is this: that the recovery last suffered, in which *William Collyer* was the vouchee, had no operation to bar his interest as tenant in tail; because, it is said, that, at the time when that recovery was suffered, *George Kinderly*, the tenant to the precipe, had no estate remaining in him; for it is contended, that the whole of the estates which were conveyed to him by the deeds of 1807 and 1809 respectively, were respectively divested and taken out of him by the re-

(*a*) 10 *Rep.* 95.

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coveries before suffered in pursuance of those conveyances.

The general principles applicable to fines and common recoveries, considered as recognized modes of conveyance, appear to be settled by numerous cases, many of which have been cited at the bar. In the language of the Lord C. J. *Willes*, in delivering the opinion of the Judges in the House of Lords in *Martin, dem. Tregonwell* v. *Strachan* (a), "they are to be considered as common assurances only, and not at all the real transactions." "They are conveyances on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee-simple." The intent of the parties is the principle on which their operation is to be construed. It is admitted that, if the sons of *Daniel Collyer*, the tenant for life, had each had a distinct fractional interest as tenants in tail in remainder, (for example, if each had been tenant in tail in remainder in one undivided fourth part,) then the recoveries in which they were respectively vouched, though purporting to be levied of the entirety, would only have operated on their respective fractional interests, and would not have divested the tenant to the precipe of the remaining fractional parts of the freehold, to which the interest of the vouchees did not extend.

Now we are of opinion, that the same principle applies to the recoveries which have actually been levied. For, although the interest of each of these tenants in tail was of a peculiar kind, and, in a certain sense, may be considered as extending to the entirety; yet it did not exhaust the entirety; but still left an interest in each of the others, who were not vouched. This interest of the others was not intended

(a) 1 *Willes' Rep.* 448. 451.

to

to be affected; and, we think, was not affected; and, consequently, that an estate of freehold, coextensive with such unaffected interests, remained in the tenant to the precipe, and was sufficient to support and give validity to the last recoveries.

Judgment for the Plaintiff.

ANN STAFFORD *v.* HAMSTON.

June 4.

The decree of the commissioners of sewers is not conclusive against a party residing within the district over which they preside; but such party may prove, in an action brought against a Defendant for taking his goods to satisfy the rate, that he derives no benefit from the sewer on account of which he is rated.

TRESPASS for taking goods, the property of the Plaintiff, and detaining the same until she paid a sum of money in order to regain the possession of them. The Defendant pleaded, first, the general issue. Secondly, a general justification, under the authority of the commission of sewers, in force at the time when, &c., and that the property was taken as a tax assessed by the said commission, and according to the statute of sewers, 23 *H.* 8. Thirdly, a justification, in substance the same, under 52 *G.* 3. Fourthly, a justification under the authority of the commission of sewers, in force at the time when, &c. the stat. of sewers, 23 *H.* 8. and the several other statutes relating to sewers. Replication to the special pleas *de injuriâ.*

At the trial before *Dallas* C. J., at the sittings after last *Michaelmas* term, the jury found a verdict for the Plaintiff, with nominal damages, subject to a case, of which the following is the substance: The Plaintiff is the owner of and resident in a house adjoining the high road, *Knightsbridge*, in the parish of *St. Margaret*, in the city of *Westminster;* the Defendant is one of the collectors of the commissioners of sewers for the district in which the Plaintiff's house is situate, and took the goods

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goods which are the subject of the action, as a distress, by virtue of a warrant duly executed by such commissioners, who had holden a commission of sewers for the city and liberty of *Westminster* and precincts of the same, and for the parish (among others) of *St. Margaret, Westminster*, on the 8th *August*, 1817, at which the jury presented, among other things, that theretofore the commissioners had laid out and expended divers sums of money in cleansing, embanking, and repairing a sewer in the parish aforesaid. And that the charges thereof, and also the charges of all other works and of all incidental expences necessarily incurred and to be incurred in and about the said sewers, ought to be borne, paid, and defrayed by the several persons, owners or occupiers of messuages, lands, &c., *whose rain and waste waters descending, issuing and falling, have passed and ought to pass* through the said common sewer into the river *Thames* proportionably, and according to their respective interests in the said messuages, &c. &c., and to the several yearly rents and profits thereof, as the said several rents and profits were thereinafter added to the respective names of the respective owners or occupiers, in three separate and distinct levels: and in the first level, (the parish of *St. Margaret, Westminster*,) the Plaintiff was rated at 300*l.*

The court of sewers then made a decree, by which it was adjudged that a rate or assessment be charged upon the several lands, messuages, &c. *within the district of*, or *receiving benefit from the said sewer*, mentioned and comprised in the said presentment, at 6*d.* in the pound.

In the year 1819, another presentment, decree, and rate, was made, similar to the above.

These several presentments, decrees, and rates, being proved, and also that the Plaintiff's house was within the

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the district comprised in them, and that she had refused payment of the sum rated, after due notice and demand, the Plaintiff offered evidence to prove that she derived no benefit whatever from the sewer in question.

The Defendant objected to the admission of such evidence, on the ground that, as the Plaintiff's house was situate within the district to which the jurisdiction of the commissioners of sewers for the city and liberty of *Westminster* is extended by the statute 47 *G.* 3. *c.* 7., she was liable to the rate, and that the presentment and decree were conclusive against her.

The question for the opinion of the Court was, whether such evidence were admissible. If the Court should be of opinion that such evidence was admissible, a new trial was to be had. If the Court should be of opinion that such evidence was not admissible, a nonsuit was to be entered.

Hullock Serjt., for the Plaintiff. The evidence which has been objected to, is admissible. Independently of the maxim, *qui sentit commodum debet et onus sentire*, it is clear from stat. 23 *H.* 8. *c.* 5., and *Keighley's* case (*a*), that, even within the district which they superintend, the commissioners have jurisdiction only over persons who derive benefit from the sewer. The *usus rei*, the suffering inconvenience from the want of a sewer, or benefit from its construction, are the only grounds on which liability to taxation is incurred. (*b*) In *Masters* v. *Scroggs* (*c*), *Dore* v. *Gray* (*d*), and *Netherton* v. *Ward* (*e*), the question was, not whether the party taxed was liable because he lived within the district of the commissioners, but whether he derived benefit from the sewer. The very language of the presentment shews,

(*a*) 10 *Rep.* 139.

(*b*) *Callis.* 120. 125. 129. 148. 151. 222. ed. 1685.

(*c*) 3 *M.* & *S.* 447.

(*d*) 2 *T. R.* 358.

(*e*) 3 *B.* & *A.* 21.

that

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that the Defendants have exceeded their jurisdiction, the jurors presenting, that the charges incurred ought to be borne by the owners, whose rain and waste waters have passed through the sewer. If this be so, owners ought to have some opportunity of shewing whether they have received benefit by the sewer or no; but unless the evidence contended for be admitted in actions by and against the commissioners, owners will have no opportunity of doing this. Even the consent of parties will not confer jurisdiction where the proceeding is *coram non judice*. *Brown* v. *Compton.* (a) The 47 *G.* 3. *c.* 7. does not give the commissioners jurisdiction over persons who derive no benefit from the sewer, but merely defines the limits within which the commissioners shall have jurisdiction over persons who do receive benefit. The 52 *G.* 3. does not touch the question.

Taddy Serjt., *contrà.* The Plaintiff, residing within the district, is liable to the sewer rate on that ground alone, and the Court cannot go on to enquire whether she derives benefit from the sewer or not. The greatest inconvenience would ensue, if in all cases the commissioners were to be put upon shewing a particular benefit; for though a drainage be a general benefit, it may be difficult to shew that a given individual has made use of the easement. The writs and statutes conferring jurisdiction on the commissioners are all in the disjunctive, giving power either over those who reside within the district of the commissioners, or those who suffer inconvenience from the want of a sewer, and benefit from its erection. *Registrum Brevium*, 127, (b) 23 *H.* 8. *c.* 5. &c. It may therefore be admitted, that where a party who resides out of the district of the commissioners is charged, benefit ought to be shewn. This

(a) 8 *T.R.* 424. (b) *De Walliis, fossatis, etc.*

was

was the case in *Masters* v. *Scroggs*, and *Dore* v. *Gray*: and it is to such persons only, that *Callis*'s doctrine of the *usus rei* can properly be applied. *Netherton* v. *Ward* does not affect the Defendants, the question in that case being only, whether a tenement in the king's dock yard was rateable.

Hullock, in reply. The commissioners are not required to shew a benefit accruing to the party assessed; it is the party who claims the right of shewing that she enjoys no benefit, if such be the fact.

DALLAS C. J. now delivered the judgment of the Court. In this case it will not be necessary to go into a great deal that has been brought forward at the bar. The question submitted by the case is merely this.— Ought the Defendant to have been admitted to prove what she offered evidence to establish, *viz.* that she derived no benefit from the sewer, in respect of which the assessment was made? And to this point the present conclusion is confined. The commissioners are only to assess those, who receive, or who are likely to reap profit, or who have, or may have hurt, loss, or disadvantage; or, as is stated by the Court in *Masters* v. *Scroggs*, "It ought to appear, that the party receives, or is likely to receive a benefit." This being clearly the ground of jurisdiction, it is not necessary to consider, with reference to the present purpose, how the common law originally stood, or what alteration different statutes have made from time to time, which may, upon many occasions, lead to very important questions.

Dore v. *Gray* (*a*) was an action of trespass for taking the plaintiff's goods; the Defendant pleaded the general issue, and a justification under the commissioners

(*a*) 2 *T. R.* 358.

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of sewers, and, on a case reserved, it was stated, that the rate was regularly made if the commissioners had jurisdiction, and whether they had or had not, was deemed by Mr. Justice *Buller* to depend on the fact, whether the party derived benefit, or was likely to derive benefit from the sewing: and it being found as a fact, that the Plaintiff might have sustained disadvantage, if the works had not been done, the commissioners were held to have jurisdiction, and the Defendant had judgment accordingly. *Masters* v. *Scroggs* (*a*) was also an action of trespass with a similar justification, and the point decided was, that the commissioners of sewers cannot assess a person in respect of drains, which communicate with other drains that fall into the great sewer, if the level of his drain is so much above the sewer, that the stopping of it could not possibly throw back the water, so as to injure his premises, and, if he be not, and it does not appear, that he is likely to be benefited by the works done upon the sewer. In the present case, the plaintiff offered evidence to prove that she derived no benefit from the sewer in question. The case states, that this was objected to, on the ground that the plaintiff's house was within the district comprised in the decree, and that the presentment and decree were conclusive against her. But this depends on the question of jurisdiction; and the commissioners cannot conclude the party without allowing her an opportunity of being heard. To this point, the two cases to which I have referred fully go; for, if the assessment had been conclusive, a case could not have been reserved finding a fact, so as to raise on such fact the question of jurisdiction for the opinion of the Court, namely, as in *Masters* v. *Scroggs*, that the party received no benefit; which necessarily

(*a*) 3 *M.* & *S.* 447.

implies,

implies, that such evidence is admissible, and that it was received at the trial. These cases are incompatible with the ground of objection made in this case to the evidence, namely, that, being within the district was sufficient; for such was the case in *Master* v. *Scroggs*, in which the assessment was by the commissioners for the limits of *Holborn*, and the Plaintiff's house was situated within the division of *Holborn*. In both these cases, therefore, it is taken for granted that such evidence is admissible; and, on the general sense and reason of the thing, it appears equally to be so. In some stage or other, the party, who is to bear a burden, on the ground that he derives, or is likely to derive a benefit, or is in danger of taking some hurt, ought to have some opportunity of shewing, that no benefit is or can be derived, or hurt sustained. This he has not before the presentment is made, nor while it is making, nor before the decree; nor has he any notice of the presentment or the decree, but by the assessment and notice of such assessment or demand under it. The effect, therefore, of rendering the presentment and decree conclusive, would be to decree against the party unheard, and without allowing him any possibility of being heard. On general principles this would be unjust; but it is enough to state the cases referred to, in order to shew, that the assessment is not considered as conclusive. This is fortified by the statute of *H.* 8., by which it is provided, that, if any action of trespass shall be brought against any person for taking any distress, or doing any other act of authority of the commission, or by authority of any laws or ordinances made by virtue of the commission, the Defendants in such actions shall and may make avowry, cognizance or justification for such taking or other act, alleging in such justification, that the said distress, trespass, or other

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other act was done by the authority of the commissioners, (as by reference to the statute will more fully appear,) whereupon the plaintiff shall be admitted to traverse such cause so alleged, and the issue shall be tried by the verdict of twelve men, and not otherwise, as is accustomed in other personal actions; and, on the trial of the issue, the whole matter shall be given by both parties in evidence, according to the truth of the same. The result, therefore, in this case is, that there must be a new trial.

Rule absolute.

June 4.

JOHNSON *v.* BRAY.

An attorney of *C. B.*, suing in that court by privilege, may, on a verdict for a sum under 5*l.*, have, by reason of his privilege, judgment and execution for costs; notwithstanding the debt for which he sues is recoverable, under the 47 *G.* 3. *c.* 37., which enacts, that "if any action shall be commenced in any other court for a debt not exceeding 5*l.*, and recoverable by virtue of that act in the Court of Requests established thereby, the Plaintiff, by reason of a verdict for him, shall not have any costs."

HULLOCK Serjt., in *Hilary* term, obtained a rule, calling on the Plaintiff, an attorney of this court, to shew cause why he should not be restrained from taking out judgment and execution for costs in this cause, (*assumpsit* brought by attachment of privilege in this court,) in which the Plaintiff obtained a verdict for no more than 1*l.* 11*s.* 6*d.* The motion was made on the ground that the Defendant resided within the jurisdiction of the *Elloe* and *Kerton* court of requests. (*a*)

Vaughan and *Pell*, Serjts., resisting the rule, on the ground that the Plaintiff, as an attorney of this court, was

(*a*) See 47 *G.* 3. *c.* 37. *s.* 13. *post.* in the judgment of this case.

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was privileged to sue here, cited *Board* v. *Parker* (*a*), *Tagg* v. *Madan* (*b*), and *Parker* v. *Vaughan*. (*c*)

Hullock, in support of the rule, urged that *Board* v. *Parker* was decided on a different act of parliament, the particular language of which, in the opinion of Lord *Ellenborough*, excluded attornies *Plaintiffs*; and that the other cases were not applicable to the present.

DALLAS C. J. now delivered judgment. The motion made in this cause, on the part of the Defendant, is founded on the statute of the 47 *G.* 3. (*d*), which is explanatory of a former act of the 15 *G.* 3. (*e*), intituled, "An act for the more easy and speedy recovery of small debts within the hundred of *Elloe* in the county of *Lincoln*," and extends the jurisdiction of the court of requests, established for that purpose, to certain parishes in the hundred of *Kerton*, in the same county.

These acts enable a Plaintiff to recover in actions of *assumpsit*, and in all causes founded on a *quantum meruit*, not exceeding five pounds. By the 13th section of the 47 *G.* 3. it is enacted, that, if any action or suit shall be commenced in any other court for a debt not exceeding the sum of 5*l.*, and recoverable by virtue of that and the former act in the court of requests established thereby, the Plaintiff, by reason of a verdict for him, shall not have any costs.

The Plaintiff's action of *indebitatus assumpsit* and on a *quantum meruit* was brought in this court. The venue was laid in the county of *Lincoln*, and he has obtained a verdict for 1*l.* 11*s.* 6*d.* only. My Brother *Hullock* has obtained a rule calling on the Plaintiff to shew cause why he should not be restrained from taking his judg-

(*a*) 7 *East*, 47.
(*b*) 1 *B.* & *P.* 629.
(*c*) 2 *B.* & *P.* 29.
(*d*) c. 37.
(*e*) c. 64.

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ment and execution for costs. The Plaintiff's answer to this motion is, that he is an attorney of this court, and that he has sued in this cause by attachment of privilege.

We are of opinion, that this is a decisive answer to the motion. That an attorney has the privilege of suing as such by attachment of privilege in the court of which he is a minister there can be no doubt. This privilege is particularly recognized in the case of *Gardner* v. *Jessop* (a), where it is said to be allowed him for the sake of the court and the suitors. If he sues as an ordinary man by original, then he is to be considered as any other Plaintiff. This was so held in *Tagg* v. *Madan* (b), and *Parker* v. *Vaughan* (c). This privilege may be taken away by the express words of an act of parliament, or by the construction of an act, in which express words are not to be found, as appears by the case of *Evans* v. *Jones*. (d) There the Plaintiff, an attorney, sued the Defendant in *Wales* by attachment of privilege issued out of the Court of King's Bench for words spoken in *Wales*. He laid his venue in a *Welch* county, in order that he might have the benefit of the statute of 13 *G.* 3. (e): he tried his cause at *Hereford*, being the next *English* county, and obtained a verdict for 5*s*. only. Lord *Kenyon*, who tried the cause under that act, certified, that the Defendant was resident in the dominion of *Wales* at the time of the service of the writ, and the Court of King's Bench, in *Michaelmas* term, 1795, ordered, according to the directions of the act, that a judgment of nonsuit should be entered. It was, certainly, a sound construction of the act, that the Plaintiff, who had the benefit of the act for the purpose

(a) 2 *Wils.* 42.
(b) 1 *B. & P.* 629.
(c) 2 *B. & P.* 29.
(d) 6 *T. R.* 500
(e) *c.* 51. *s.* 1.

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of trial, should be bound by the provision of it in other respects.

There have been many other cases decided, by the superior Courts, on the subject of an attorney's privilege. It is not necessary to cite any other than *Board* v. *Parker*. (a) The principles on which we decide do not militate with the decision in that case. In that case, the Plaintiff, an attorney in the Court of King's Bench, residing at *Bath*, did business there for the Defendant, who resided within the city of *London*, and was liable to be sued in the court of requests there. He laid his venue in *Somersetshire*, and obtained a verdict for 4*l*. 19*s*. only. The Court held, that, though the demand might have been recovered in the court of requests, yet, that the Plaintiff was entitled to sue as an attorney in his own court; and was not compellable, under the 39 & 40 *G*. 3., to sue the Defendant in the court of requests: Lord *Ellenborough*, in giving his opinion in that case, says, that attornies, as Defendants, are expressly by those acts made subject to the processes, orders, judgments, and executions of that court; and, therefore, he infers, that attornies, Plaintiffs, were not meant to be included. But it is manifest that, unless the attorney had a privilege to sue in his own court, and had a right to avail himself of it by suing as such by attachment of privilege, he would have been within the act. By the conclusion of his Lordship's opinion, it is plain that he did not rely much on that ground.

We are of opinion that the rule must be discharged without costs.

Rule discharged accordingly.

(a) 7 *East*, 47.

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Held, that a bond, in the condition whereof it was recited that the Plaintiff was entitled to an interest in certain veins of coal for her life, and that she, by indentures of even date with the bond, had assigned such interest to the Defendants, who, in consideration thereof, had agreed to pay her an annuity for her life, for the payment of which the bond was conditioned, did not require enrolment under stat. 23 *Geo.* 3. *c.* 141.

And that, in cases of fair and *boná fide* sale of landed property, whether freehold for life or leasehold for term of years, when the consideration, in part or in whole, is an annuity to be paid to the vendor, the consideration for granting the annuity being an estate in land, *boná fide* sold and conveyed, is not a pecuniary consideration, or money's worth, within the statute.

PELL Serjt., on the 12th *May*, moved to enter a nonsuit in this case, on the ground that a bond on which the action was brought, ought, under the circumstances of the case (which appear fully in the judgment of the Court) to have been enrolled under the 53 *Geo.* 3. *c.* 141.

DALLAS C. J., on a subsequent day, delivered the following judgment.

This was an action on a bond, in the penal sum of 800*l.* By the condition it was recited, that the Plaintiff was entitled to an interest in certain veins of coal for her life, and that she, by indentures of even date with the bond, had assigned such interest to the Defendants, who, in consideration thereof, had agreed to pay her an annuity of 60*l.* *per annum*, and the bond was then conditioned for the payment of that annuity to the Plaintiff for her life.

The Defendants pleaded, that no memorial was enrolled according to the statute.

The Plaintiff replied, that the annuity was granted for the considerations mentioned in the deeds, and not for money or money's worth, within the intent of the statute on which issue was joined.

The

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The cause came on to be tried before Mr. Baron *Garrow*, at the last assizes at *Monmouth*, when a verdict was taken for the Plaintiff, with liberty for the Defendant to move to enter a nonsuit, if the Court should be of opinion that such a bond as this requires enrolment.

The 2d section of the stat. 53 *Geo.* 3. *c.* 141. requires every memorial of an annuity enrolled in pursuance of the act to specify, among other things, "the pecuniary consideration or considerations for granting the same;" which words necessarily pre-suppose and require the existence of a pecuniary consideration to be so specified, and shew that the statute does not apply to cases where no such consideration exists.

The form of memorial also given by the same section, in the column headed "Consideration, and how paid," specifies only pecuniary considerations, whether paid in money or in bank notes, or other notes or bills of exchange, as the case may be.

The 10th section declares, that the act shall not extend (amongst other things) "to any voluntary annuity or rent-charge, granted without regard to pecuniary consideration or money's worth," and from these words it has been argued, that the act applies to all cases where any thing valuable is given for the purchase of an annuity.

It is here that these words import, that "money's worth" may, in certain cases, be "a pecuniary consideration," within the meaning of the act, as, where the grantee pays for the annuity in part or in whole, by goods or merchandize, with a nominal or perhaps real value imposed upon them, to be converted into money by the grantor; and where the object of the grantor was to raise money, and such appears to be the real nature of the transaction, however it may be disguised.

But, considering the 2d and 10th sections together, and the intent of the legislature, as it is to be collected

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therefrom, the Court is of opinion, that the act does no extend to cases of fair and *bonâ fide* sale of landed property, whether freehold for life or leasehold for term o years, where the consideration in part or in whole may be an annuity to be paid to the vendor. In such cases the consideration for granting the annuity being an estate in land *bonâ fide* sold and conveyed, does not appear to the Court to be a pecuniary consideration or money's worth, within the meaning of the statute.

Such appears to be the present case; and therefore my Brother *Pell* will take nothing by his motion.

Rule refused

The same observations apply to *Harrison* v. *Smitheringale* (a)

(a) In which *Blosset* Serjt. had, in this term, made a similar motion on a similar ground.

REGULA GENERALIS.

It is ordered, that in all country ejectments which hereafter shall be served before the essoin day, either of *Michaelmas* or *Easter* term, the time for the appearance of the tenant in possession shall be within four days after the end of such *Michaelmas* or *Easter* term, and shall not be postponed till the fourth day after the end of *Hilary* or *Trinity* term next respectively following.

R. Dallas.
J. A. Park.
J. Burrough.
J. Richardson.

22d *May*, 1821.

END OF EASTER TERM.

AN

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TO THE

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AGREEMENT.

WHERE *A.* entered into and signed an agreement, as agent of *B.*, and *B.* shortly afterwards signed it with the words, "I hereby sanction this agreement, and approve of *A.*'s having signed it on my behalf:" Held, that *A.* was not personally responsible. *Spittle* v. *Lavender*. 452

ANNUITY.

1. The memorial of an annuity deed stated the consideration to consist of Bank of *England* notes payable on demand, and of a draft, payable at a banker's, without specifying the time when. The annuity had been paid eleven years, and the attesting witness and agent of the grantee were both dead. The Court set aside the securities on the ground that the memorial did not state when the draft was payable, or whether it had been in fact paid. *Drake* v. *Rogers*. Page 19

2. Deed between *B. J. B.* and the Defendant of the one part, and *N. P.* of the other part, by which *B. J. B.* and the Defendant agreed with *N. P.*, his executors and administrators, to pay him an annuity for 21 years, if *B. J. B.* and the Defendant, or the survivor of them, should so long live; and if *N. P.* should die during the term without making any appointment of

of the annuity, to his child or children for the residue of the term; and if there should be no child, to the widow of *N. P.* *N. P.* died within the term intestate, and without appointment, leaving *M. E. P.*, an only child, who also died during the term intestate and without appointment. The wife of *N. P.* died during his life. Held, that the administrator of *M. E. P.* could not sue the Defendant on this deed for non-payment of the annuity. *Barford* v. *Stuckey*. Page 333

3. Held, that a bond, in the condition whereof it was recited that the Plaintiff was entitled to an interest in certain veins of coal for her life, and that she, by indentures of even date with the bond, had assigned such interest to the Defendants, who, in consideration thereof, had agreed to pay her an annuity for her life, for the payment of which the bond was conditioned, did not require enrolment under stat. 23 *G.* 3. *c.* 141. And that, in cases of fair and *bonâ fide* sale of landed property, whether freehold for life or leasehold for term of years, when the consideration in part or in whole, is an annuity to be paid to the vendor, the consideration for granting the annuity being an estate in land, *bonâ fide* sold and conveyed, is not a pecuniary consideration, or money's worth, within the statute. *James* v. *James*. 702

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1. A replevin clerk, who is partner in an attorney's firm, must sue alone for the expenses of preparing a replevin bond, though it be prepared at the office of the firm. *Brandon* v. *Hubbard*. Page 11
2. An attorney of *C. B.*, suing in that court by privilege, may, on a verdict for a sum under 5*l.*, have, by reason of his privilege, judgment and execution for costs; notwithstanding the debt for which he sues is recoverable, under the 47 *G.* 3. *c.* 37., which enacts, that "if any action shall be commenced in any other court for a debt not exceeding 5*l.*, and recoverable by virtue of that act in the Court of Requests, established thereby, the Plaintiff, by reason of a verdict for him, shall not have any costs." *Johnson* v. *Bray*. 698

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BAIL.

BANKRUPTCY.

1. The Defendant, in an action on a bail-bond (given in an action of debt against himself), becoming bankrupt between plea and verdict in the action on the bail-bond, and obtaining his certificate after judgment, is discharged from the damages and costs. *Dinsdale* v. *Eames.* *Page* 8

2. Held, that evidence of a dealing in hops was properly admitted in a cause brought to try the validity of a commission of bankrupt describing the Plaintiff as *dealer in cattle*, seeking his trade of living by buying and selling. *Hale* v. *Small.* 25

3. A trader assigned a ship to *A.* in trust to pay a debt due from the trader to *A.* and his partners, but, with their permission, retained the possession and disposition of the ship at the time of his bankruptcy: Held, that the ship passed to the assignees under the commission of bankruptcy, by virtue of the 21 *J.* 1. *c.* 19. *s.* 11., although before the act of bankruptcy the register was indorsed to *A.*, and shortly afterwards (three months before the issuing of the commission) the ship was newly registered in his name, and continued so registered at the time the commission was issued.

The 21 *J.* 1. *c.* 19. is not repealed as to shipping, by the ship register acts. *Monkhouse* v. *Hay.* *Page* 114

4. In *November*, 1818, a commission of bankruptcy was issued against *M.* and Co., under which the Defendants were appointed assignees. *H.*, being indebted to *M.* and Co., had deposited with the Defendants, as assignees of *M.* and Co., a promissory note; and, in *January*, 1819, paid this debt to the Defendants as such assignees, who then delivered the note back to him. *H.* had, unknown to any of the parties, in *May*, 1818, committed an act of bankruptcy; and in *May*, 1819, a commission issued against him. In *August*, 1819, the commission against *M.* and Co. was superseded; and, in *September*, 1819, a new commission issued against them, under which the Defendants were again chosen assignees. Between the superseding of the first commission against *M.* and Co. and the re-appointment of the Defendants as assignees under the second, the Plaintiffs, as assignees of *H.*, demanded of the Defendants the sum which *H.* had paid to them as assignees of *M.* and Co. In an action by the Plaintiffs as assignees of *H.* against the Defendants in their own right, for the money received by them from *H.*, the jury having found a verdict for the Defendants, the Court refused

BILL OF EXCHANGE.

And see Evidence, 20.

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See Annuity, 3.

CHARTER-PARTY.

day of the ship's report inwards at the port of *London*. The voyage was performed. and goods of third persons brought from *Demerara* under bills of lading, deliverable to the consignees on payment of certain specified freights therein mentioned, which freights the Defendant received, no bill for the three quarters' freight *per* charter-party having been given or tendered to him, and a bill for one quarter given at *Newfoundland* having been dishonoured: Held, (*Dallas* C. J. *dissentiente*,) first, that, notwithstanding the words of grant, taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; and that, as the freight *per* charter-party was to be paid to him by good bills, prior to the delivery of the homeward cargo, he had a lien thereon for such freight: secondly, that he had a right to receive the freight *per* bills of lading from the consignees, and had a like lien on such freight when so received. *Christie* v. *Lewis*. *Page* 410

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An assignment to trustees of all the emoluments and profits which, during the life of *A.*, and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, *after deducting the salary or allowance of his deputy for the time being*, upon trust, to pay the interest arising on certain debts due from *A.*, and from time to time render the surplus and residue, after satisfying the trusts to *A.*, is invalid. *Palmer* v. *Bate*. *Page* 673

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CONSTABLES.

Some constables, under a warrant to search a house for black cloth which had been stolen, finding no black cloth, took cloth of other colours, and carried it before a magistrate, refusing, at the same time, to tell the owner of the house searched whether they had any warrant or no: Held, that they were within the protection of the stat. 24 *G.* 2. *c.* 44.: and that an action against them ought to have been commenced within six months after the grievance complained of. *Smith* v. *Wiltshire*. 619

CONTINGENT DAMAGES.

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COVENANT.

See Pleading, 9, 13. Charter-Party. Power.

CROSS-REMAINDERS.

See Devise, 3.

DEED.

See Annuity.

DETINUE.

See Devise, 4, 5.

DEVISE.

And see Replevin, 1.

1. The devisor, by will, left all his "real and personal estates" to his brother; by a codicil, reciting that since the making of the will his brother had died, and that devisor was possessed of a considerable fortune both real and personal, the devisor, after a devise to nephew *J.*, left all his estates, lands, and tenements in *H.*, *F.*, and *M.* to his nephew, *G. E.*, and other lands to nephews *L.* and *C.*, respectively, none of them to come into possession till they were respectively of age; and if one or more of them should die before he or they came of age, the estate or estates of him or them so dying were then left to nephew *J.* and his issue, lawfully begotten; and if *J.* should die without issue, to *G. E.*; and for default of such issue in *G. E.*, to *L.* and his issue; and in default of such issue in *L.*, to *C.* and his issue; and for default of such issue in *C.*, to nephew *S.* and his issue; and for default of such issue in *S.*, to niece *K.* and her issue, in such manner, and under such restrictions and limitations as she should think proper to dispose of the same among her issue, it being the intent of the will to prevent waste by making the several children of *G.E.* tenants for life only. *Power* for nephews marrying to make reasonable settlements on their wives, and to dispose of their respective estates among the issue of such marriages, in manner as they should think proper to limit and appoint the same. The residue not disposed of was left to nephews and niece, except *S.*, to be divided among them, share and share alike, at their respective coming of age; and if any should die before that time, the share of the party dying to go to the survivors and survivor: Held, that *G. E.*, under this will and codicil, took an estate for life in the lands in *H.* *Bruce* v. *Bainbridge*. *Page* 123

2. *T. M.* devised lands to trustees, their heirs and assigns, until his nephew, *J. R. M. W.*, son of his sister *M. W.*, should attain 21; and if he should die in the mean time, until *H. W.*, second son of *M. W.*, should attain 21; and if *H. W.* should die in the mean time, until the daughter of *M. W.* should attain 21; in trust, to raise out of the rents, or by sale or mortgage, 2000*l.*, and pay the same to *H. W.*, when

when he attained 21; and if *M. W.* should have more than one younger child, to raise out of the rents 3000*l.*, and pay the same among such younger children, share and share alike, when they should severally attain 21; and, upon further trust, to apply a proper sum out of the rents, for the education and maintenance of *J. R. M. W.* till he should attain 21, and then to pay him the residue of them, if any should remain after performance of the before-mentioned trusts; and if *J. R. M. W.* should die before 21, then to apply a sufficient sum from the rents for the education and maintenance of *H. W.* till he should attain 21, and then to pay him the residue of the rents, if any should remain after performance of the before-mentioned trusts, and in the mean time to place out at interest, for the benefit of his nephews, the money arising from the said rents; and when *J. R. M. W.* should attain 21, or, in case of his death, when *H. W.* should attain 21, or, in case of his death, when the daughter of *M. W.* should attain 21, to the use of *J. W.* and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent remainders: and after the death of *J. R. M. W.*, to the use of the first, second, third, and all and every other son and sons of the body of *J. R. M. W.* lawfully issuing, severally, successively, and in remainder, according to priority of birth, and of the several and respective heirs male of his and their respective body and bodies lawfully issuing, the elder always to take before the younger, and the heirs male of his and their body and bodies issuing; and in default of such issue, to the first, second, and third, and all and every other daughter and daughters of the body of *J. R. M. W.* lawfully issuing, severally and successively, according to priority of birth, and of the heirs male of the respective body and bodies of such first and other daughters lawfully issuing, the elder of such daughter and daughters, and the heirs male of her and their body and bodies, always to take before the younger of them, and the heirs male of her and their body and bodies issuing; and for default of such issue, to the use of *H. W.* and his assigns, for life, *sans* waste; remainder to trustees, to preserve contingent uses and estates, and then to the use of his sons and daughters, in like manner as to the sons and daughters of *J. W.*; and for default of such issue, to the use of his niece, the daughter of *M. W.*, and her assigns, for life, *sans* waste, and then to the use of her sons and daughters, in like manner as to the sons and daughters of *J. R. M. W.* and *H. W.*; and for default of such issue, to the use of *M. W.*, in fee: Provided that whoever became possessed of the lands should take devisor's name, and live in his house, otherwise the devise to be void as to the person refusing; his plate and furniture to

to remain in the house as heir-looms. *T. M.* died, leaving his sister, *M. W.*, her sons, *J. R. M. W.*, *H. W.*, and three younger children, alive. *J. R. M. W.* married, and died under age, leaving a daughter, *M. E. M. W.*

Held, that on the death of *J. R. M. W.*, *M. E. M. W.* became entitled to the lands devised, as tenant in tail male, subject to the annuities, &c.; that the heir looms, being personalty, vested in her at the same time, and that she was entitled to the possession of them; and, that the personal representative of *J. R. M. W.* was entitled to the savings of the rents and profits of the estates accrued in the lifetime of *J. R. M. W.*, subject to the annuities, &c. *Warter* v. *Warter*. *Page* 349

3. Devise to three trustees of all his freehold, leasehold, and copyhold estates, and all his personal estate, in trust, to pay legacies and annuities (the annuities to be paid out of his 3 *per cent.* stock), and all the rents, issues, profits, dividends, interest, profits, and produce of the residue of his estate and effects, to his three nieces, *E. M.*, *M. M.*, and *C. M.*, share and share alike, for the term of their respective lives; and after the decease of them, or either of them, that the lawful issue of them, and each of them, should have his or her mother's share of such rents, &c. for life; and if either of the nieces should die in the lifetime of the other, without issue, the share of her so dying should be divided equally between the survivors of the nieces for their respective lives, and afterwards by the issue of the survivors of the nieces; and if all the nieces save one should die without issue, such one should have the whole for her life; and, after her decease, the issue of such niece, if more than one, should enjoy the whole, share and share alike; if but one, should enjoy the whole alone; such parts as were freehold to them, if more than one, their heirs and assigns, as tenants in common, and not as joint tenants; if but to him or her, his or her heirs and assigns. If all the nieces should die without issue, the whole to go to devisor's next male heir of the name of *M.*, his heirs and executors. *M. M.* married *G. B.*, who died leaving *M. M.* and one son. *C. M.* married, but had no issue. Two of the trustees died. A large surplus of personal estate remained, after paying debts, legacies, and annuities. Held,

1st, That the surviving trustee had the legal estates in the freehold tenements devised.

2dly, That the nieces took no legal estate in the freehold tenements.

3dly, That the son of *G. B.* took no legal estate in those tenements, and would take none if he survived the three nieces.

4thly, That if the will had commenced with the words, "all the rents, &c." and the passage before these words had been omitted, the three nieces would respectively

have

have taken under the will, in the said freehold tenements, estates for life; with cross-remainders between them for life, in the event of one or two of them dying without lawful issue.

5thly, That the said *G. B.* would now have an estate in tail in remainder in his mother's one undivided third part of the said freehold tenements, subject to be divested in part by the birth of other children of his mother, whether sons or daughters; and that he would have an estate in tail in the whole of the said freehold tenements, in the event of his being the only issue of the three nieces living at the death of the survivor of them, no other issue having been born. *Murthwaite* v. *Barnard*. *Page* 623

4. Devise of land to devisor's grand-daughter, *A. M.*, for life; remainder to trustees, during the life of *A. M.*, to support contingent remainders; remainder to all and every the children in tail, with cross-remainders between them in tail; and, in default of issue of all and every the children of the grand-daughter, to devisor's daughter, *B. C. M.*, for life; remainder to such one or more of the children of *B. C. M.* as *B. C. M.*, by deed or will attested by three witnesses, should appoint for their lives; remainder to all and every the child and children of such daughter or daughters, to be appointed by *B. C. M.*, as aforesaid; and if only one should be appointed, to her and the heirs of her body; and if more than one should be appointed, all of them to take their mother's shares, *per stirpes*, as tenants in common, and not as joint-tenants; with cross-remainders between them, the children of such daughters, as to their mother's shares in tail; and on failure of such issue of any one or more of such daughters, with cross-remainders to the others of their issue; and, in default of appointment, and of any appointment not exhausting the whole fee, the land, or so much as should not be exhausted by appointment, to *B. C. M.* for life; remainder to all her daughters for their lives, with cross-remainders for life between them; remainder, during the lives of the daughters of *B. C. M.* and the survivor, to support contingent remainders; and, for default of issue of any or either of the daughters of *B. C. M.*, to *B. C. M.* and her heirs.

A. M. died, sole and intestate, leaving *B. C. M.* her heir at law, and heir at law of devisor. *B. C. M.* has nine daughters, many of whom are married and have issue: Held,

1st. That *B. C. M.* has in the lands an estate for life, with an ultimate reversion to herself in fee.

2dly. That, in default of appointment, the daughters now living of *B. C. M.* have, respectively, in the lands estates for life in remainder, as tenants in common, with cross-remainders amongst themselves for life;

life; with remainders to themselves in tail, respectively.

3dly. That, in default of appointment, the grandchildren of *B.C.M.* have no estate in the lands.

4thly. That *B. C. M.* has power by appointment to designate which one, or more than one of her daughters, is, or are, to take under the will; that if more than one are designated, they will take under the will as tenants in common for life; with remainder to their respective children, as tenants in common in tail; with cross-remainders between them (the children of the appointed daughters), in tail; such cross-remainders to take place, as well with regard to the shares of their respective mothers as with regard to the shares of their aunts, in the event of a failure of issue of any of the aunts. *Medlycott* v. *Jortin*. *Page* 632

A., on 17th *July*, 1812, made a will, by which he devised certain real estates to his wife for life; and on her death, to *M. B.*; and on the death of his wife and *M.B.*, to his executors in fee, upon certain trusts. The will, which was attested by three witnesses, concluded by stating that *A.* had signed his name to the two first sides, and his hand and seal to the last side of the will, which was written on three sides of a sheet of paper. *A.* put his name and seal at the end of the will, but did not sign his name to the two first sides. In *November*, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was to confine the first devise to his wife, to her widowhood, and to strike out the devise to *M. B.*; the original date was struck out, and the day of *November*, 1816, was substituted. The will was never re-signed, re-published, or re-attested; but, in the following month, *A.* caused a fair copy of it to be made, and added one interlineation not affecting his real estate: but the copy was never signed, published, or attested. The will and fair copy were found locked up in a drawer at the residence of the testator, who died on the 24th *December*, 1816: Held, that the will was well executed; and that there was no revocation of it as it stood originally. *Winsor* v. *Pratt*. *Page* 650

DISTRESS.

See Pleading, 1. 14. Landlord and Tenant, 2, 3, 4, 5. Power. Replevin.

EJECTMENT.

And see Power.

1. In every action of ejectment, the Defendant shall specify in the consent rule for what premises he intends to defend, and shall consent in such rule to confess upon the trial, that the Defendant (if he de-

defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises; and that if, upon the trial, the Defendant shall not confess such possession, as well as lease entry, and ouster, whereby the Plaintiff shall not be able further to prosecute his suit against the said Defendant, then no costs shall be allowed for not further prosecuting the same, but the said Defendant shall pay costs to the Plaintiff in that case to be taxed. *Regula Generalis.* Page 470

2. In all county ejectments which shall be served before the essoin day, either of *Michaelmas* or *Easter* term, the time for the appearance of the tenant in possession shall be within four days after the end of such *Michaelmas* or *Easter* term, and shall not be postponed till the fourth day after the end of *Hilary* or *Trinity* term next respectively following. *Regula Generalis.* 705

EVIDENCE.

And see Replevin, 1. 2. Bankruptcy, 2. Bill of Exchange. Power. Sewers.

1. An attorney, being requested to draw an assignment of goods, refused, and the deed was drawn by another. The validity of the deed being afterwards questioned, on the ground of fraud, in an action against the sheriff in which the attorney first applied to was not employed: Held, that the communication made to this attorney was professional, and that evidence of the fraud proposed to be given through him, was properly rejected. *Cromack* v. *Heathcote.* Page 4
Sed vide Wadsworth v. *Hamshaw.* 5

2. Defendants were sued for the price of some growing trees, which they had purchased, cut down, and carried away; a witness proved an admission by one of them that something was due, and a promise to pay. At the time of the bargain, written memoranda had been made of the transaction; but these memoranda (one of them an item in a book of accounts,) being neither stamped nor signed with the names of the parties, were not produced in evidence, and the Plaintiff was nonsuited: Held, that the nonsuit was proper. *Teal* v. *Auty.* 99

3. The commander in chief of the army, having directed an assemblage of commissioned military officers to hold an enquiry into the conduct of *H.*, a commissioned officer in the army; and *H.* having sued the president of the enquiry for a libel stated to be contained in the report thereupon made: Held, that this report was a privileged communication; that it was properly rejected as evidence at the trial; and that an office copy of the same was also properly rejected. *Home* v. *Bentinck.* 130

4. If a witness, without objecting

to it, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding upon his conscience; but it is unnecessary and irrelevant to ask him, if he considers any other form of oath more binding, and such question cannot be asked. *The Queen's case.* *Page* 284

5. It is not allowable, on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shewn the witness the letter, and having asked him whether he wrote that letter. *Ibid.* 286

6. Two or three lines of a letter may be exhibited to a witness, without exhibiting to him the whole, and the witness may be asked whether he wrote the part exhibited.

But, if the witness deny that he wrote such part, he cannot be examined as to the contents of the letter. *Ibid.* *Ibid.*

7. If, on cross-examination, a witness admits a letter to be of his hand-writing, he cannot be questioned by counsel whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read in evidence.

In the ordinary course of proceeding, such letter must be read, as part of the cross-examining counsel's case. The Court, however, may permit it to be read at an earlier period, if the counsel suggest that he wishes to have the letter immediately read, in order to found certain questions upon it, considering it, however, as part of the evidence of the counsel proposing such a course, and subject to the consequences thereof. *The Queen's case.* *Page* 288

8. If, on cross-examination, it is proposed to ascertain of a witness, whether he has made representations of any particular nature, immediately after being asked whether he made any representation, he must be asked whether he made the representation by parol or in writing. *Ibid.* 292

9. If, on the trial of an action or indictment, a witness examined on the part of the Plaintiff or prosecutor, upon cross-examination by Defendant's counsel, states, that at a time specified he told *A.* that he was one of the witnesses against the Defendant, and, being re-examined by the Plaintiff's or prosecutor's counsel, states what induced him to mention this to *A.*, the Plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses: by eight Judges against one (*Best* J. *dissentiente*) and confirmed by the House of Lords. *Ibid.* 294

10. If a witness examined in chief on the part of the Plaintiff, being asked whether he remembers a quarrel taking

taking place between *A.* and *B.*, answer, that he has heard of a quarrel between them, but does not know the cause of it, and such witness be not asked, upon his cross-examination, whether he has or has not made a declaration stated in the question touching the cause of the quarrel, the counsel for the Defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel. *The Queen's case.* *Page* 299

11. If a witness examined in chief on the part of the Plaintiff, being asked whether he remembers a quarrel taking place between *A.* and *B.*, answer, that he does not remember it, and such witness be not asked, on his cross-examination, whether he has or has not made a a declaration stated in the question respecting such quarrel, the counsel for the Defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration. *Ibid.* 299

12. If, on the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that *A.B.* (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine *C. D.* as a witness to prove, that *A.B.* has offered a bribe to *E.F.* in order to induce him to give testimony touching the matter in the indictment, (*E. F.* not being a witness examined in support of the indictment, nor examined before it was so proposed to examine *C.D.*) *The Queen's case.* *Page* 302

13. If, in the trial of an indictment for any crime, evidence has been given upon the cross-examination of witnesses examined in chief in support of the indictment, from which it appears that *A. B.* (not examined as a witness,) has been employed by the prosecutor as an agent to procure and examine evidence and witnesses in support of the indictment, the party indicted is not permitted to examine *G. H.* as a witness to prove that *A. B.* has offered him a bribe, to induce him to bring to *A.B.* papers belonging to the party indicted, (*G. H.* not having been examined as a witness in support of the indictment.) *Ibid.* 299

14. On a prosecution for a crime, the proof whereof is supposed to consist wholly or in part of evidence of a conspiracy entered into by the party then indicted, and under trial, so that the conspiracy is to be given in evidence against him,— general evidence of the existence of the conspiracy charged, may be re-

received in the first instance, though it cannot affect such Defendant, unless brought home to him or to an agent employed by him. *The Queen's case.* *Page* 299

The same rule applies, if a Defendant seeks by such general evidence, in the first instance, to affect the prosecutor with a conspiracy to suborn witnesses for the destruction of his defence, provided the proposed evidence be previously opened to the Court, as in the case of a prosecution to be proved by conspiracy. *Ibid.*

15. When a witness in support of a prosecution has been examined in chief, and has not been asked in cross-examination as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the party accused to examine witnesses in his defence to prove such declarations or acts, without first calling back such witness examined in chief to be examined or cross-examined as to the fact, whether he ever made such declarations or did such acts. *Ibid.* 311

16. If a witness is called on the part of a Plaintiff or prosecutor, and gives evidence against the Defendant or accused; and if, after the cross-examination of such witness, the Defendant's or accused's counsel discover that the witness so examined has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause, the counsel for the Defendant or accused are not permitted to give evidence of such corrupt act of such witness, without calling back such witness. *The Queen's case.* *Page* 311

17. An assignee of a bankrupt who has released his individual claims on the bankrupt's estate, is an admissible witness to prove the petitioning creditor's debt. *Tomlinson* v. *Wilkes.* 397

18. A grant of wreck was made by *Hen.* 2. to the proprietors of certain lands on the coast, and confirmed by *Hen.* 8. The proprietors of those lands having, 40 years ago, with a view to reclaim sea mud, run an embankment across a small bay, which was used to be left almost dry at low water, and having ever since asserted, without opposition, an exclusive right to the soil of the bay, though the bank was forced by tempest: Held, that such usage was evidence whence anterior usage might be presumed, which, coupled with the general terms of the grant, served to elucidate it, and to establish the right so asserted. *Chad* v. *Tilsed.* 403

19. Where the lessees of a fishery had publicly landed their nets on the shore at *A.* for more than 20 years, and had, at various times, dressed and improved the landing place (both the fishery and the landing place having originally belonged to one person, but no evidence

dence being offered to show that he, or those who under him owned the shore at *A.*, knew of the landing of nets by the lessees of the fishery): Held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at *A.* *Gray* v. *Bond.* *Page* 667

20. The Plaintiff declared on three bills of exchange, in three several counts; but, according to his particular, only sought to recover on the bill set forth in the first count. The defence being, that the Defendants were not partners when the bill set forth in the first count was drawn, the Plaintiff tendered in evidence the other two bills, for the purpose of establishing the fact of the partnership: the evidence having been rejected, on the ground that these bills were not included in the particular, the Court granted a new trial. *Duncan* v. *Hill.* 682

EXECUTION.

See Landlord and Tenant, 3, 4.

EXECUTOR.

See Pleading, 1. Promissory Note.

FACTOR.

The circumstance of a principal's drawing bills on his factor to be provided for out of the proceeds of goods consigned, does not authorize the factor to pledge the goods: therefore, where *A.* consigned goods to *B.* for the purpose of sale, at the same time drawing bills to the amount of 1588*l.* 5*s.* 7*d.* on *B.*, to be provided for out of the proceeds; and *B.* pledged the goods for 2500*l.* to *C.* (who knew that *A.* was the owner), and paid 294*l.* in discharge of one of the bills; and *C.* afterwards sold the goods for *B.* for 4033*l.*; it was held, that *A.* was entitled to recover from *C.*, in an action for money had and received, (in which 1533*l.* was paid into Court,) the whole balance of 2500*l.* *Fielding* v. *Kymer.* *Page* 639.

FIERI FACIAS.

See Landlord and Tenant, 3, 4.

FINES AND RECOVERIES, PRACTICE OF PASSING.

1. The Court allowed a recovery to pass, where the certificate of the notary (that the party who made the affidavit of the caption and acknowledgment of the warrant of attorney was sworn in his presence before the deputy fiscal at *Cape Town*,) omitted the day and month in the body of the certificate, but stated it correctly at the end, where the notary witnessed the instrument; the date of the jurat of the affidavit being the same as that at the bottom of the certificate.

cate. *Hinde demandant. Hinde tenant. Bland vouchee.* *Page* 7

2. In a recovery, the *præcipe*, warrant of attorney, and affidavit of caption were engrossed on *parchment*, and sent to certain commissioners at *Rotterdam*. The commissioners copied these instruments upon paper (in consequence of the refusal of the *Dutch* notary to certify upon *English* documents, which the *Dutch* law would not allow him to do), and returned them written upon *paper*, and stamped with a *Dutch* stamp, and certified by the *Dutch* notary. On a motion that the appearance of the tenant might be recorded, the warranty of the vouchees entered, and all other usual proceedings had, notwithstanding these documents were upon *paper*, the Court unanimously rejected the application. *Tatham demandant.* 65

3. The Court allowed the writ of entry in a recovery suffered 56 *G.* 3. to be amended by altering the names of the parties, on affidavit that the recovery was intended to be suffered according to the amendment prayed, and that all the parties were living and consenting to the motion. *Edge demandant.* 98

4. By a deed to lead the uses of a recovery suffered in *Trinity* term, 1 *W.* & *M.*, *M. L.* and *E. L.* conveyed to *J. N.*, to make him tenant to the *præcipe*, all the manors and farms of *B.* and *C.*, then in the occupation of *M. L.*, her tenants and assigns, and all other the manors, messuages, services, rents, lands, tenements, and *hereditaments*, in the county of *S.* and isle of *W.* of them, *M. L.* and *E. L.*, or either of them: By a deed to lead the uses of a recovery suffered in *Hilary* term, 13 *G.* 1., *M. L.* and *E. L.*, son of *E. L.*, conveyed the before mentioned *hereditaments* and premises to *D. W.*, to make him tenant to the *præcipe*: The tithes had been enjoyed with the lands, since the time of *James* the First: The Court refused to amend these recoveries by inserting the word *tithes*. *Phillips and Carey demandants. Avery and Phillips demandants.* *Page* 105

5. No motion shall be made at the bar on the last day of any term touching the amendment of any fine or recovery, or any of the proceedings therein. *Regula Generalis.* 122

FISHERY.

See EVIDENCE, 19.

FRAUD.

See MONEY HAD AND RECEIVED.

FRAUDS (STATUTE OF).

See DEVISE, 5.

FREEHOLD.

See LANDLORD AND TENANT, 1.

FREIGHT.

See INSURANCE, 2.

GAME,

underwriter on ship was entitled to the freight.

Abandonment of ship to the underwriter on ship includes freight, and transfers freight earned subsequently to the abandonment to such underwriter, as incident to the ship. *Davidson* v. *Case.* *Page* 379

INTERLINEATION.

See DEVISE, 5.

LANDLORD AND TENANT.

And See SHERIFF, 1.
PLEADING, 1. 6. 11. 13, 14.

1. A conservatory erected by tenant for years (who had a remainder for life, after the death of his lessor) on a brick foundation, attached to a dwelling-house, and communicating with it by windows opening into the conservatory and a flue passing into the parlour chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees. *Buckland* v. *Butterfield.* 54

2. In 1814, a distress was made on a tenant for the whole of the rent due from him, and a deduction for land-tax was refused, the lease being silent as to the land-tax; the tenant having protested against his liability, paid, during five succeeding years, the land-tax, without renewing in any sort the objection of his non-liability to pay: Held, that in 1820 he could not recover, in an action for money paid to the Defendant's (the lessor's) use, any of the sums so paid for land-tax. *Spragg* v. *Hammond.* *Page* 59

3. A stranger became possessed of a crop of growing corn, by purchase at a sale under a *fieri facias*, upon which sale the landlord was paid a year's rent. The landlord, before the corn was ripe, distrained it for rent due subsequently to the sale: Held, that the distress was ill. *Peacock* v. *Purvis.* 362

4. Growing corn sold under a *fieri facias* cannot be distrained for rent, unless the purchaser allow it to remain on the ground an unreasonable time after it is ripe. *Ibid.*

5. One of several co-heirs in gavelkind may distrain for rent due to him and his companions without an actual authority from his companions. *Leigh* v. *Shepherd.* 465

6. A lessee took a farm under an agreement, which he never signed, and the terms of which his lessor, in a material point, failed to fulfil. In an action for the use and occupation of the farm: Held, that the jury might ascertain the value of the land, without regarding the amount of rent reserved by the agreement. *Tomlinson* v. *Day.* 680

LAND-TAX.

See LANDLORD AND TENANT, 2.

LEASE.

See POWER. RENEWAL FINE.

LIBEL.

The Defendant having fraudulently induced the Plaintiff to sell goods to *A.*, who could not pay for them; and, on the nominal re-sale of these goods by *A.*, in which the Defendant was really concerned, having obtained himself the money paid on such re-sale: Held, that the Plaintiff might, in an action for money had and received, recover of the Defendant the value of the goods unpaid for by *A.* *Abbotts* v. *Barry*. 369

An assignment of the profits of all the offices of trust, commissions, &c. which the Defendant may acquire, is good, as to all offices which may be legally assigned, by way of indemnifying the Plaintiff, who has paid money for the Defendant. *Harrington* v. *Kloprogge*. 678

the security provided by the Defendant was void within the Defendant's own knowledge, at the time of the purchase. In *January*, 1820, Plaintiff sued Defendant in *assumpsit*, for breach of an implied contract to provide good security: Held, that, the action proceeding on the contract and not on the fraud, the statute of limitations was a good bar. *Brown* v. *Howard*. *Page* 73

4. Goods in the possession of a bankrupt, and, but for the bankruptcy, his property, being taken in execution after the act of bankruptcy, but two months before the issuing of a commission against the bankrupt, were (in *assumpsit* by the assignees of the bankrupt, on a guarantee given to the bankrupt,) described in the declaration as the goods of the bankrupt: Held, that such description was proper. *Sampson* v. *Burton*. 89

5. Plaintiff, as administrator, declared in *assumpsit* that Defendant, for certain fees. to be paid him by intestate, undertook, as attorney, to investigate and see that a title about to be conveyed to intestate was a good one: breach, that he omitted to do so, and that intestate in consequence took an insufficient title, whereby his personal estate was injured. Defendant having demurred, the demurrer was overruled. *Knights* v. *Quarles*. 102

6. A declaration on a replevin bond (conditioned for the Plaintiff in replevin to appear at the county court and prosecute his suit with effect, and make a return of the cattle, goods, &c. distrained, if a return should be adjudged), after alleging that the plaint was removed into the court above, that the Defendant avowed, and that, Plaintiff in replevin having omitted to plead to the avowry, a judgment for a return was awarded, averred, that the Plaintiff in replevin did not prosecute his suit with effect. A plea, that, after the judgment for a return, a writ to enquire of the arrear of the rent and the value of the cattle, goods, &c. distrained, was prayed by the avowant, granted, and executed, and that thereupon avowant had judgment to recover the arrear of rent found, together with a sum for his costs and damages, was held ill on demurrer. *Turner* v. *Turner*. *Page* 107

7. The declaration stated, that in consideration Plaintiff would, at the request of Defendant, lend him a horse, Defendant promised *to take proper care of the horse, and return him to Plaintiff in as good a condition as he was in at the time of the promise, or pay fifteen guineas*; the contract proved was, in addition to these terms, *that the Defendant should find the horse meat for his work*: Held, that the contract was sufficiently stated in the declaration, and according to its legal effect. *Handford* v. *Palmer*. 359

8 Declaration, that Defendant, on consideration, &c. promised to invest

vest Plaintiff's money on good security; breach, that he invested it on bad security; pleas, general issue and statute of limitations; replication, that Defendant promised as above, within six years; proof, that within that time Defendant acknowledged the security to be bad, and promised that Plaintiff should be paid: Held, that Plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied.

Held, also, that the Defendant was not liable on a count upon an account stated; nor on a count for money had and received, as having received money for one purpose and applied it to another. *Whitehead* v. *Howard*. *Page* 372

9. If, in covenant for non-repairing, the covenant contains an exception of "casualties by fire," it is fatal, on *non est factum*, if the covenant be stated in the declaration without such exception; and the Court will refuse to permit the Plaintiff to amend on paying the costs of the trial. *Browne* v. *Knill*. *Page* 395

10. In an action against the master of a ship for penalties under the 34th section of the *pilot* act, the declaration must allege that the unlicensed pilot *offered to the master* to take charge of the ship; or, that such pilot *offered* to take such charge *in the presence of the master;* and it is not sufficient merely to follow the words of the section. *Peake* v. *Carrington*. *Page* 399

11. An avowry by one of several coheirs in gavelkind in his own right, with a cognizance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs. *Leigh* v. *Shepherd*. 465

12. In a declaration in debt in C. B. a reference to the *clausum fregit* of the writ is not necessary; and an averment, under a *videlicet*, that the court was sitting on a day in vacation, may be regarded as surplusage. *Luckett* v. *Plummer*. 659

13. Tenants in common may sue in covenant, for neglect of repairs, the lessee of a house, who, subsequently to the demise, but before the breach alleged, becomes a cotenant of the Plaintiffs in the same house. *Yates* v. *Cole*. 660

14. In replevin, plea of a former distress for the same rent, without adding that the rent was satisfied, is bad. *Hudd* v. *Ravenor*. 662

POWER.

Devisee for life, with a power enabling her, in consideration of marriage, to revoke the uses limited to her, and to appoint to such uses, and with such powers and provisoes, and in such manner as was by her afterwards done, by a deed of settlement, in consideration of marriage, revoked the uses, and appointed the lands, to hold to the use, after the marriage, of her husband for life, *sans* waste; and after

after his decease, to the use of herself for life, *sans* waste; with remainder to divers other uses, for the benefit of the issue of that marriage, and also of the issue of the appointor; remainder as she should by will appoint, with remainder to the use of herself in fee. The settlement contained a power for the husband and wife, from time to time, when in possession of the premises so limited to them for their lives, by indenture to demise such premises as then were leased for lives, or for years determinable on lives, to any persons, in possession or reversion, for one, two, or three lives, so as there were not thereon any greater estate or interest subsisting at any one time, than what would be determinable on the dropping of three lives; and so as there were reserved the ancient and accustomed yearly rents, duties, and services, or more, or as great or beneficial rents, duties, and services, or more, or a just proportion of such ancient or the then reserved rents, &c. (except heriots, which might be varied at will); *and so as there were contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved:* and also, by indenture to demise any of the premises for any term absolute, not exceeding 21 years, in possession, and not in reversion; so as there were reserved so much, or as great and beneficial yearly and other rent and rents, and other services proportionably, as then were therefore paid and yielded, or the best and most improved yearly rent and rents that could be reasonably had or obtained for the same, without taking any fine; and so as in every such lease there were contained a clause of re-entry, in case the rents reserved were unpaid by the space of 28 days: and also, by indenture to demise any of the premises wherein or whereupon any mine or mines should be open, or any person should be willing to open any mine, for any term not exceeding 31 years in possession, so as upon every such lease there were reserved such share of the produce, or such yearly rent, as could reasonably be obtained without taking any fine; and so as the lessees were not by any express clause freed from impeachment of waste, other than in the necessary and reasonable working thereof; and so as there were inserted such proper and usual covenants for the effectually winning and working the mines, and smelting the ore, and doing other acts, as were usually inserted in leases of the like nature. The lands in the declaration mentioned had been and were leased, and were under and subject to a lease, for a term of years determinable on lives. The husband, after the marriage, by indenture, in consideration of the former lease and of 105*l.*, and of the yearly rents, duties, payments, services,

services, articles, covenants, provisoes, and agreements thereinafter specified and reserved on the part of the lessees, demised the lands in question for 99 years, if three or either of them should so long live, paying the yearly rent of 2*l.* by equal portions, at *Michaelmas* and *Lady-day*, with a couple of fat capons, or 1*s.* 6*d.* in lieu thereof, at the election of the lessor; and also an heriot of the best beast, or 40*s.* in lieu thereof, upon the death of every tenant dying in possession; and the like upon every assignment, sale, forfeiture, or alienation; and also the lessees yielding and doing constant suit of mill, paying such toll and multure as others grinding their corn there should pay. The lease contained a covenant by the lessees to pay the yearly rent of 2*l.*, and the duties, heriots, suits, services, and other reservations, at the time and in the manner limited and appointed for payment and performance of the same, or else the several sums reserved in lieu thereof; with a proviso, that *if at any time the rent of* 2l., *and every or any of the duties, services, reservations, and payments thereby reserved, or any part, should be unpaid or undone by 15 days next over or after any of the times whereat or whereupon the same ought to be paid, done, or performed, and no sufficient distress or distresses could or might be taken upon the premises;* or, if the lessees should leave the premises in decay six months after view had and notice given or should commit any wilful waste, or grind their corn at any other mill (the lessor's mill being in repair); or if the lessees should assign without licence, or if any default should be by the lessees made in the payment or performance of all or any of the reservations, covenants, and agreements thereinbefore on their parts contained, *then the lessor, and the person to whom the freehold of the premises should belong, might re-enter.* Upon the trial of an ejectment, evidence was received that the usual and accustomed form of leases of the estate contained in the marriage-settlement, for lives or years determinable on lives, as well prior as subsequent to that settlement, was with a conditional proviso of re-entry similar to that in this indenture.

Held, that the lease was a good execution of the leasing power.

And, that the evidence of the former leases was well received. *Smith* v. *Doe, dem. Jersey.* 473

PRACTICE.

1. A misnomer of the Plaintiff can only be taken advantage of by plea in abatement, and affords no ground for setting aside proceedings on motion. *Morley* v. *Law.* 34
2. Where a prisoner who had been charged with a declaration as of *Trinity* term, 1819, absconded during the long vacation, and did not return to custody till *Hilary* term, 1820, the Court would not dis-

discharge him though the Plaintiff had not signed judgment by the end of *Hilary* term, 1820. *Grimes* v. *Joseph*. *Page* 35

3. The Court refused to set aside as irregular a bill filed against the warden of the *Fleet*, on the day after the essoin. day of *Easter* term, entitled as of *Easter* term, and accompanied with a notice to plead in four days, the Plaintiff not having signed judgment within eleven days after the filing of the bill. *Bolton* v. *Eyles*. 51

4. Affidavit to hold to bail, stating that *R. M.* was justly and truly indebted unto the said *J. W.* in the sum of, &c. and upwards: "as the acceptor of a certain bill of exchange, bearing date, &c., drawn by the said *J. W.* for a valuable consideration on, and accepted by the said *R. M.*, payable two months after the date thereof, and due at a day now past:" Held, to contain a sufficient description of the debt. *Warmsley* v. *Macey*. 338

5. Affidavits to hold to bail: one by *A. B.*, stating *C. D.* to be "justly and truly indebted to this deponent" in a certain sum, "as indorsee" of bills of exchange "drawn by *E. F.* upon, and accepted by *C. D.*, payable to the order of the said *E. F.*, at a certain day now past, and indorsed to this deponent." The other, by *A. B.*, stating *G. H.* to be "justly and truly indebted to this deponent" in a certain sum, "as indorsee of a certain bill of exchange drawn by *E. F.* upon, and accepted by, the said *G. H.*, payable to the order of the said *E. F.* at a certain day now past:" Held to contain a sufficiently certain description of the respective debts of *C. D.* and *G. H.* *Lamb* v. *Newcomb*, *Same* v. *Edwards*. *Page* 343

6. A turnkey cannot be bail. *Daly* v. *Brooshoft*. 359

7. The Court will not set aside the justification of bail on account of perjury subsequently discovered, but will leave the party to his indictment for perjury. *Shee* v. *Abbot*. 619

PRINCIPAL AND AGENT.

See Factor.

PRISONER.

See Practice, 1.

PRIVILEGE,

See Attorney, 2.

PROMISSORY NOTE.

A promissory note, by which the makers, *as executors, jointly and severally, promise to pay on demand, with interest*, renders them personally liable. *Childs* v. *Monins*. 460

PROMOTIONS, 1.

RECOVERY.

See Fines and Recoveries, Practice of Passing.

A. was seised of an estate for life; remainder to his sons, *B.*, *C.*, *D.*, and *E.*, in tail, in such shares and pro-

proportions as *A.* should appoint by will. In 1807, *A.*, *B.*, *C.*, and *D.* conveyed the entirety of the premises to make a tenant to the *præcipe*, so that one or more recoveries should be suffered, in which *A.*, *B.*, *C*, *D.*, and *E.* should be vouchees for the purpose of barring all estates tail: a recovery was then suffered, in which *B.* and *C.* were vouched. In 1809, *A.*, *B.*, *C.*, *D.*, and *E.* conveyed all the premises to make a tenant to the *præcipe*, in a recovery which was suffered in 1810, in which *E.* was vouched; and, in 1811, a recovery was suffered, in which *D.* was vouched.

Held, that by these conveyances and recoveries, the estates tail in *B.*, *C.*, *D.*, and *E.* were well barred. *Collyer* v. *Mason.* *Page* 685

RE-ENTRY.

See Power.

REFEREE.

See Trover.

REGULÆ GENERALES.

See Fines and Recoveries, 5, Ejectment.

RENEWAL FINE.

A. being possessed of certain premises held under an archbishop by lease, renewable from time to time on payment of certain fines and fees, demises the premises for a term to *B.*, who covenants "that he will, from time to time, and at every time during the said term, pay to *A.* or the archbishop, such part of the fine and fees which, upon every renewal by *A.* of th lease by which he holds the premises demised, shall be paid, or payable, by *A.* in respect of the premises demised to *B.*" *A.* afterwards renews his lease under the archbishop for a period exceeding, by five years, the term demised to *B.*: Held, that *B.* was not liable, upon this covenant, to pay the whole of the fine and fees incurred by *A.* upon the renewal of his lease to the extent above mentioned, but only a part of such fine and fees, commensurate with the interest which *B.* had acquired in the premises. *Charlton* v. *Driver.* *Page* 345

RENT ARREAR.

See Landlord and Tenant, 3, 4, 5. Power.

REPLEVIN.

And see Attorney, 1. Pleading, 6, 14. Replevin Bond.

1. By a settlement made on the marriage of Sir *H. J. P.*, the estate *T.* was settled to the use of Sir *H. J. P.* for life, remainder to his first and other sons in tail male, reversion to Sir *H. J. P.* the settlor, in fee. There was issue of the marriage a son, *J. P.* who attained the age of twenty-one, but died in 1767 without issue, leaving Sir *H. J. P.*, his father, him surviving. *J. P.* took upon himself, among other things, to devise the estate *T.* to his father for

for life, with remainder to his sisters of the half-blood, *M.* and *A.* in fee. Sir *H. J. P.* accepted certain benefits under this will; and in 1769, devised the estate *T.* (after the deaths of his daughters *M.* and *A.* without issue male) to *H. P.* for life, with several remainders over. In an action of replevin, by a person claiming under the will of Sir *H. J. P.*, the avowant, who claimed as heir of *A.*, read in evidence the answer of the real Plaintiff to a bill filed against him by the avowant, in which answer the real Plaintiff admitted, that he believed that certain articles of agreement between Sir *H. J. P.* and his son *J. P.*, were made in the year 1766, whereby *J. P.* agreed to pay 700*l.*, and an annuity of 200*l.* *per annum* to his father, who, in consideration thereof, agreed to convey estate *T.* immediately to his son, subject to a proviso, that if the son should die in the life time of the father, the conveyance was to be wholly void. Held, that Sir *H. J. P.* was not, by accepting benefits under the will of *J. P.*, divested of the reversion in estate *T.*; that *M.* and *A.* took nothing in the estate under the will of *J. P.*; and that, on the trial it was not necessary for the Judge to direct the jury to presume, that some conveyance of the reversion in fee had been made by Sir *H. J. P.* to his son *J. P.*

2. The letters of a party, under whom the Plaintiff did not claim, were held inadmissible as evidence to affect the Plaintiff's title. *Halford* v. *Dillon.* *Page* 12

REPLEVIN CLERK.

See Attorney, 1.

REPLEVIN BOND.

Sureties in a replevin bond are not discharged by the execution of a writ of enquiry, under 17 *Car.* 2. *c.* 19. *s.* 23., and a judgment thereon for avowant to recover the arrear of rent found, together with a sum for his costs and damages. *Turnor* v. *Turner.* 107

REQUESTS, COURT OF.

See Attorney, 2.

REVOCATION.

See Devise, 5.

SEWERS.

The decree of the commissioners of sewers is not conclusive against a party residing within the district over which they preside; but such party may prove, in an action brought against a Defendant for taking goods to satisfy the rate, that he derives no benefit from the sewer on account of which he is rated. *Stafford* v. *Hamston.* 691

SHERIFF.

1. The trustees of an outstanding satisfied term, assigned in trust to attend

attend, the inheritance, may sue the sheriff for not retaining, after notice to do so, in an execution against the tenant, a year's rent due to the landlord.

2. A notice to the sheriff in such case, stating that the rent was due to *J. W.* and the mortgagees of his estate, and signed by a person who was not the receiver appointed by the mortgage deed, was held sufficient.

3. The sheriff is liable, in such case, if he remove any of the tenant's goods without retaining the year's rent. *Colyer* v. *Speers.* *Page* 67

Where a sheriff by mistake returned to a *fieri facias* that he had a sum in his hands to be paid to the Plaintiffs, when in truth he had not, the sum in question having been paid (through want of caution in the sheriff's officer) to the solicitor of a commission of bankrupt issued against the Defendant, under which commission one of the Plaintiffs was an assignee: Held, that this Plaintiff knowing of such payment and having omitted to make an early objection to it, the sheriff was absolved from paying to the Plaintiffs the sum mentioned in his return. *Tomlinson* v. *Shynn.* 77

SHIP.

See Bankruptcy, 3. Insurance. Charter-Party.

STAMP.

The following letter from *F.* and Co. to their correspondents *S.* and Co., "Gentlemen, we request you will pay to Messrs. *H. C.* and son, or their order, out of the first proceeds that become due of our stock of gunpowder now in your hands, 600*l.*, and charge the same to our account," was held an order for the payment of money, under 55 *Geo.* 3. *c.* 184., and liable to be stamped as such, and not with an agreement stamp, although the letter formed part of a correspondence between the three houses, being followed by a letter to *H. C.* and son from *S.* and Co., promising to pay as directed, *provided they should be in funds for the purpose,* and by other letters between the houses of *F.* and Co. and *S.* and Co. relating to, and confirmatory of, the same order. *Butts* v. *Swann.* *Page* 78

SURETIES.

See Replevin Bond.

TENANTS IN COMMON.

See Pleading, 13.

TITHES.

See Fines and Recoveries, Practice of Passing, 4.

TOLL.

By the 2 *G.* 3. *c.* 67. (local act,) under which a turnpike gate was erected at *L.*, the toll, when carriages passed, was imposed on the carriages, not on the horses drawing